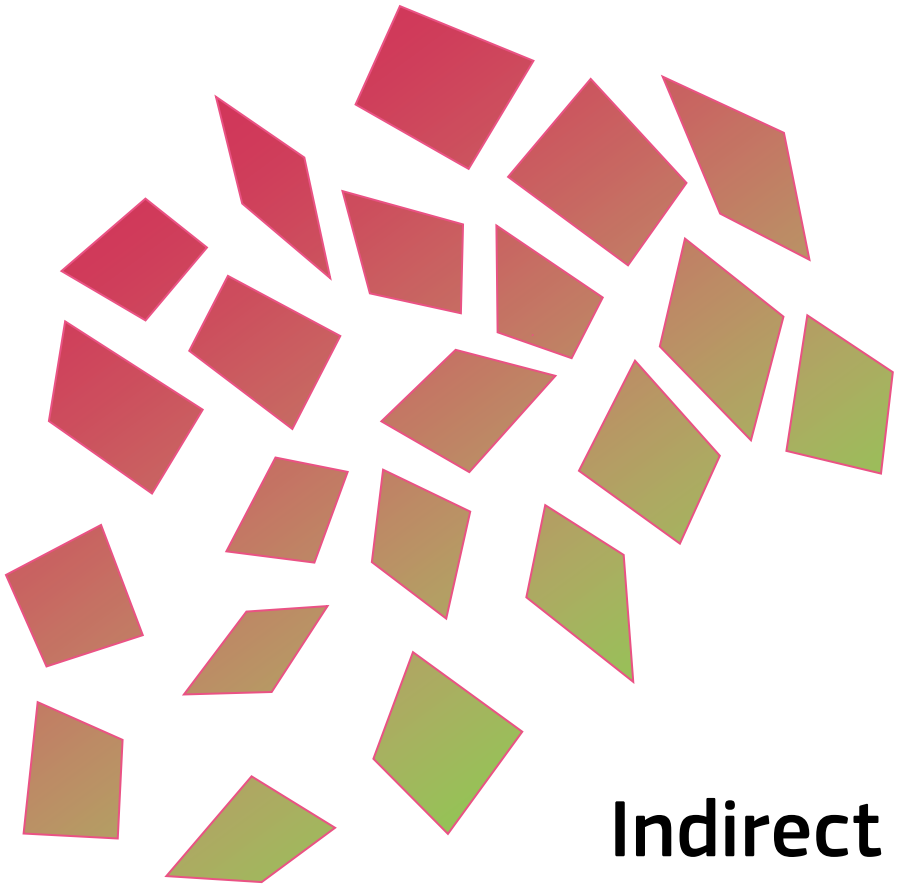
Indirect discrimination under directives 2000/43 and 2000/78

Tobler, R.C.

European Commission

European network of legal experts in gender equality and non-discrimination



Indirect discrimination under Directives 2000/43 and 2000/78

Including summaries in English, French and German

Justice and Consumers

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Author

Christa Tobler

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Executive summary

What is indirect discrimination? The concept denotes measures that appear to be neutral in relation to a legally prohibited discrimination ground and thus apparently unproblematic but which, due to the situations of the people to whom they apply, nevertheless have a detrimental effect on persons protected by such a ground, and that cannot be justified. In other words, such measures appear acceptable on an abstract level but are problematic on a concrete level due to their disparate effect.

The indirect nature of the discrimination relates to how a given treatment is linked to a particular discrimination ground. Indirect discrimination is in substance (rather than in form) linked to a prohibited discrimination ground. Indirect discrimination is not readily obvious but rather implicit. However, the indirect nature of the discrimination does not mean that its victims are in any way less affected. Indeed, an individual victim of indirect discrimination suffers just as much as a victim of direct discrimination. In both cases, rights and opportunities are prejudiced, and in both cases, discrimination can have a negative impact on social and economic status, wellbeing and health. In the specific context of EU law, the Court of Justice of the European Union (CJEU) has stated that discrimination in general 'may undermine the achievement of the objectives of the TFEU [Treaty on the Functioning of the European Union], in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity and the objective of developing the European Union as an area of freedom, security and justice'.[1]

Unfortunately, experience has shown that the concept of indirect discrimination is often not understood and sometimes not even accepted or acknowledged. Moreover, its application in practice presents a number of challenges. In a recent evaluation of the implementation of Directives 2000/43[2] and 2000/78[3] in the EU Member States, the European Commission found a limited awareness and application of the concept of indirect discrimination in domestic judicial practice.[4]

That finding is confirmed by this report, which updates an earlier report, *Limits and potential of the concept of indirect discrimination*, written for the European network of legal experts in the non-discrimination field (as it was then called) in 2008.[5] The current report updates the earlier report in light of developments in the CJEU case law on Directives 2000/43 and 2000/78, but also in view of developments in international human rights law and in the national law of the EU Member States.

EU law must be seen in the context, and against the background, of other international law. The report briefly mentions three specific **international human rights instruments** of the United Nations, namely the Convention on the Elimination of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (CRPD; this convention is of particular relevance in the context of EU law due to the fact that the EU itself is a party to it). All of them prohibit not only direct but also indirect discrimination. The same

1 CJEU, Joined Cases C-804/18 and C-341/19 *IX v WABE eV and MH Müller Handels GmbH v MJ*, 15 July 2021, ECLI:EU:C:2021:594 (Grand Chamber), paragraph 62.
2 Council Directive 2000/43/EC of 29 June 2009 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180/22.
3 Council Directive 2000/78/EC of 27 November 2009 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16.
4 Report from the European Commission to the European Parliament and the Council on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('the Racial Equality Directive') and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ('the Employment Equality Directive'), COM(2021) 139 final, p. 4.
5 Tobler, C. (2008) *Limits and potential of the concept of indirect discrimination*, European network of legal experts in the non-discrimination field, Luxembourg: Office for Official Publications of the European Communities.

is true for the European Convention of Human Rights (ECHR) of the Council of Europe, though here the initial development of the concept was considerably slower and more hesitant than in EU law.

International human rights law recognises that the causes of discrimination are often of a structural nature. Going beyond such recognition, some conventions explicitly oblige the States Parties to pursue transformative equality. Such provisions are the logical consequence of the prohibition of all forms of discrimination including, in particular, indirect discrimination. Where structural problems in a particular society are at issue, it is not enough to prohibit such discrimination and to make amends in individual cases. Rather, it is imperative that the root causes are tackled and that this is done in a pro-active and comprehensive manner.

In the EU, the prohibition of indirect discrimination is part of **a broader and multi-layered system of EU equality or non-discrimination law**. On the one hand, that system comprises general equality or non-discrimination principles – now also embodied in the Union's Charter of Fundamental Rights (CFR) – that apply in all fields of Union law. On the other hand, it includes statutory equality and non-discrimination provisions both on the level of primary law other than the Charter and of secondary Union laws that apply within their defined (and usually limited) fields of application.

Since the Lisbon treaty revision, which entered into force on 1 December 2009, the Charter of Fundamental Rights has enjoyed the same legal status as the Treaties. It binds the EU institutions, bodies, offices and agencies in all their actions and it binds the Member States whenever they are acting within the scope of EU law. Importantly, this latter condition means that the provisions of the Charter are not free-standing but can only be applied in the context of other Union law. This also limits the potential of the fact that, similar to Article 14 ECHR and in contrast to EU law other than the CFR, the non-discrimination provision of Article 21 CFR contains an open list of discrimination grounds ('any ground such as').

In terms of their practical effect for individuals, in cases where there is a conflict between the national law of the Member States and Union law and where this conflict cannot be avoided by interpreting the national law in conformity with EU law, Charter provisions may be relied on by individuals as a last resort. The conditions for this are that a given provision is sufficient in itself to confer rights on individuals and that it does not need to be made more specific by provisions of EU or national law. This is notably the case for Article 21 CFR. It can be relied on in horizontal situations (i.e. in cases involving individuals both as applicants and as defendants) but will not be needed in vertical situations (i.e. in cases involving individuals as applicants and the State as the defendant) that involve directly effective provisions of EU directives, since in such cases, the relevant provisions of the directives can be relied on.

Directives 2000/43 and 2000/78 are part of the EU's statutory equality or non-discrimination law. In their respective fields, they give expression to the general principle/CFR right of equality and non-discrimination. They bind the Member States who must make sure that their national law is in line with these Directives. The Directives are based on a closed list of discrimination grounds and cannot be expanded by adding further grounds through interpretation. However, in some cases, the concept of indirect discrimination may be able to bring criteria for a given treatment under a prohibited criterion. Further, the Member States are free to add discrimination grounds as a matter of their national law. Examples of a broader approach and, more generally, of useful approaches (i.e. good practice) in the Member States that may serve as guidance for the application of the concept of indirect discrimination, are mentioned in Part E of this report, on national legislation and case law.

The **function of the concept of indirect discrimination under EU law** can be said to be twofold: to enhance the effectiveness of the prohibition of discrimination and to make visible and challenge the underlying causes of discrimination, which are often structural or systemic in nature. Indirect discrimination is one of several types or forms of discrimination listed in Directives 2000/43 and 2000/78, alongside direct discrimination, instruction to discriminate and harassment.

As for the **meaning of the concept of indirect discrimination**, its most characteristic element is the focus on the detrimental effect of a measure, rather than on its outward appearance (or on any intent of the perpetrator). Detrimental effect within the meaning of the concept leads to a finding of apparent or *prima facie* (at first sight) discrimination, i.e. a presumption of the existence of indirect discrimination that can be rebutted. A final finding of discrimination depends on the absence of any justification, be it objective within the meaning of the legal definition of indirect discrimination or statutory (i.e. specific justification grounds stated in the law).

The starting point for any finding of indirect discrimination is a measure the basis of which is formally different from a prohibited discrimination criterion (however, CJEU case law has introduced an important twist, in that the use of a formally different ground does not necessarily exclude a finding of direct discrimination, as mentioned further below). In cases where a truly 'apparently neutral' measure is at issue, it will depend on the circumstances – both legal and factual – whether the use of this measure raises the suspicion of indirect discrimination. This will be the case where it has, actually or potentially, a relevant detrimental effect on the people who should be protected compared with other persons. In such a case, the measure in question is only 'apparently' neutral.

Under Article 2(2)(b) of Directive 2000/78, the concept of indirect discrimination requires that the measure in question would put at a disadvantage persons having 'a *particular* religion or belief, a *particular* disability, a *particular* age, or a *particular* sexual orientation' (emphasis added). Article 2(2)(b) of Directive 2000/43 refers to 'persons of a racial or ethnic origin'. Confusingly, CJEU case law on the requirement of a 'particular' sub-category of a given discrimination ground appears to differ depending on the discrimination ground. So far, the Court has insisted on this element only for some grounds (racial or ethnic origin as well as religion), which obviously limits the concept of indirect discrimination. The national laws of some Member States sometimes omit the word 'particular', which may lead to a higher degree of protection. This is possible under EU law because the two directives contain minimum requirements only.

An apparently neutral measure with a disparate effect amounts to indirect discrimination only if it is not objectively justified or does not fall under a statutory derogation. Objective justification means first of all that a measure leading to apparent indirect discrimination has a legitimate aim. This is an open concept that is not limited to a closed list of grounds, meaning that there is potentially a broad range of grounds that may be acceptable. However, the Court's recent case law emphasises that an aim can be legitimate only if there is a genuine need for it. Further, the means chosen to achieve the legitimate aim must be proportionate, i.e. appropriate and necessary. A measure is appropriate if it is suitable for achieving the aim in question. Importantly, that can be the case only if the aim is genuinely pursued in a consistent and systematic manner. A measure taken is necessary or requisite if another measure with a lesser or no disparate effect would not do the job. The Court has emphasised that the measure chosen must be limited to what is strictly necessary.

Generally, case law shows that the CJEU relatively easily accepts that a given aim as such is legitimate, and that a considerably greater challenge follows on the subsequent level of judging the proportionality of the measure chosen to achieve that aim (i.e. the measure's appropriateness and necessity).

Indirect discrimination should be distinguished from other legal concepts that are relevant in the context of Directives 2000/43 and 2000/78. The report discusses the relationship of the concept of indirect discrimination with discrimination by association (which concerns the person who is affected by discrimination), positive action (which the directives mention as a mere possibility for the Member States), positive obligations (mentioned in certain CJEU case law), reasonable accommodation for persons with a disability (prescribed by Directive 2000/78 and capable of preventing a finding of discrimination) and direct discrimination.

The **distinction between direct and indirect discrimination as developed through the Court's case law** is particularly important but also challenging. The two concepts are logical counterparts. To

distinguish between them is important for practical reasons: first, in most cases there are fewer grounds for justifying direct discrimination than indirect discrimination, since under EU law direct discrimination can only be justified on the basis of grounds stated in the law (statutory justification grounds), whilst for indirect discrimination there is the additional possibility of objective justification.

Generally speaking, in the case of direct discrimination, the link with the discrimination ground is strong. In fact, the link is straightforward where the prohibited ground is expressly relied on. Conversely, in the case of indirect discrimination, the link with the discrimination ground is comparatively weaker, as it requires additional considerations, having regard to the *effects* of the measure. It is characteristic for indirect discrimination that the disadvantaged group consists not exclusively, but only predominantly, of persons who are protected by the discrimination ground in question. Accordingly, they are 'merely' disproportionately represented in the disadvantaged group.

Under the Court's present case law, it may be that the use of criteria that seem neutral will still have to be assessed in the context of direct discrimination. Two lines of case law can be discerned: First, the main line focuses on the nature of a formally neutral criterion as being inextricably or inseparably linked to a prohibited discrimination ground: where such a criterion is being used, the correct frame of analysis will be direct (rather than indirect) discrimination. There are now several cases that take this perspective. A second, in terms of numbers less prominent line, focuses on the reasons why a certain disadvantageous treatment is meted out to certain persons or group of persons: where it can be proved that these reasons were related to a prohibited discrimination ground, again the correct frame of analysis will be direct (rather than indirect) discrimination.

According to CJEU case law, **formally neutral criteria that are, nevertheless, 'inseparably' or 'inextricably' linked to a prohibited discrimination** ground must be assessed in the framework of direct, rather than indirect discrimination. In the leading case of *Szpital Kliniczny*,[6] which concerns discrimination based on disability, the Court formulated the following test for direct discrimination: '[...] where an employer treats a worker less favourably than another of his or her workers is, has been or would be treated in a comparable situation and where it is established, having regard to all the relevant circumstances of the case, that that unfavourable treatment is based on the former worker's disability, inasmuch as it is based on *a criterion which is inextricably linked to that disability*, such treatment is contrary to the prohibition of direct discrimination set out in Article 2(2)(a) of Directive 2000/78' (emphasis added).

From this, it follows that a formally neutral criterion which, due to certain additional circumstances, is nevertheless inextricably linked to a prohibited discrimination ground, is to be regarded as being 'based on' that ground. As a consequence, the relevant framework for analysing it is that of direct discrimination. Only where that is not the case, does the analysis shift to indirect discrimination, described by the Court as relating to 'other criteria not related to the protected characteristic':

> 'Regarding [...] the question whether a practice such as that at issue in the main proceedings constitutes indirect discrimination for the purposes of Article 2(2)(b) of Directive 2000/78, it is apparent from the case-law of the Court that such discrimination may stem from a measure which, albeit formulated in neutral terms, that is to say, by reference to other criteria not related to the protected characteristic, leads, however, to the result that persons possessing that characteristic are put at a particular disadvantage [...].'[7]

The report also discusses in some detail the predecessor judgments by the CJEU that led up to *Szpital Kliniczny.*

6 CJEU, Case C-16/19 *VL v Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie,* 26 January 2021, ECLI:EU:C:2021:64 (Grand Chamber), paragraph 48.

7 CJEU, Case C-16/19 *VL v Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie,* 26 January 2021, ECLI:EU:C:2021:64 (Grand Chamber), paragraph 55.

In a second, less prominent line of case law, the Court held that a measure constitutes direct discrimination if that measure proves to have been **'introduced and/or maintained for reasons relating to' a prohibited discrimination ground**.[8] Further on in the same judgment, the Court contrasts direct and indirect discrimination in the following manner:

> '[I]t should be recalled that, as is clear from the answer given to the second, third and fourth questions, if it is apparent that a measure which gives rise to a difference in treatment has been *introduced for reasons relating to racial or ethnic origin*, that measure must be classified as "direct discrimination" within the meaning of Article 2(2)(a) of Directive 2000/43. By contrast, indirect discrimination on the grounds of racial or ethnic origin does not require the measure at issue to be based on reasons of that type. As is apparent from the case-law recalled in paragraph 94 of the present judgment, in order for a measure to be capable of falling within Article 2(2)(b) of Directive 2000/43, it is sufficient that, although using neutral criteria not based on the protected characteristic, it has the *effect* of placing particularly persons possessing that characteristic at a disadvantage.'[9]

The following is the attempt to synthesise the Court's increasingly complex case law on the delimitation of direct and indirect discrimination as relevant for Directives 2000/43 and 2000/78 as it stands at the time of writing:

Direct discrimination:

- The concept of direct discrimination will in any case be relevant where *express use* is made of a prohibited discrimination ground. This is, indeed, the easiest category in order for the purposes of identifying the direct nature of the discrimination. In the Court's modern case law, the large majority of direct discrimination cases concern differentiations on the basis of age.
- Further, the concept of direct discrimination will be relevant if it can be proven that a criterion, even if formally neutral, has been *chosen for reasons related to a prohibited discrimination ground* (*Nikolova*).
- Moreover, the concept of direct discrimination will be relevant where the criterion used is *inseparably or inextricably linked* to a prohibited discrimination (as confirmed in particular in *Szpital Kliniczny*). It seems that the Court in this context puts the focus on the exclusionary effect of the criterion in question: either all those disadvantaged by the criterion belong to the same protected group (*Nikoloudi,*[10] *Kleist,*[11] *Andersen,*[12] *Maruko,*[13] *Römer*)[14] or that group includes persons who are completely excluded in the sense that they will not be able to meet the criterion in question (*Hay*).[15]

Indirect discrimination:

- For any other criteria that are formally, ostensibly or at first glance neutral, the concept of indirect discrimination will be relevant. In such cases, both the advantaged and disadvantaged groups will be heterogeneous.

8 CJEU, Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* (third parties: Anelia Nikolova, Darzhavna Komisia za energiyno i vodno regulirane), 16 July 2015, ECLI:EU:C:2015:480 (Grand Chamber), paragraph 91.
9 CJEU, Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* (third parties: Anelia Nikolova, Darzhavna Komisia za energiyno i vodno regulirane), 16 July 2015, ECLI:EU:C:2015:480 (Grand Chamber), paragraphs 95 and 96.
10 CJEU, Case C-196/02 *Vasiliki Nikoloudi v Organismos Tilepikoinonion Ellados AE*, 10 March 2005, ECLI:EU:C:2005:141.
11 CJEU, Case C-356/09 *Pensionsversicherungsanstalt v Christine Kleist,* 18 November 2010, ECLI:EU:C:2010:703.
12 CJEU, Case C-499/08 *Ingeniørforeningen i Danmark, acting on behalf of Ole Andersen v Region Syddanmark,* 12 October 2010, ECLI:EU:C:2010:600 (Grand Chamber).
13 CJEU, Case C-267/06 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*, 1 April 2008, ECLI:EU:C:2008:179 (Grand Chamber).
14 CJEU, Case C-147/08 *Jürgen Römer v Freie und Hansestadt Hamburg,* 10 May 2011, ECLI:EU:C:2011:286 (Grand Chamber).
15 CJEU, Case C-267/12 *Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, 12 December 2013, ECLI:EU:C:2013:823.

A further part of the report discusses various **challenges that arise in the practical application of the concept of indirect discrimination**. Whenever the legal concept of indirect discrimination is applied in practice, the examination of the case at hand will have to involve a three-step analysis relating to 1) the scope of the law, 2) the nature of the measure as amounting to apparent (or *prima facie*) indirect discrimination, and 3) objective or statutory justification. In this analytical context, the following questions must be asked and answered:

1) Does the case fall within the field of application of the non-discrimination law that is to be applied in the relevant EU Member State, i.e. national law as seen against the background of EU law?
2) If so, can the victim of the alleged discrimination show that there is apparent indirect discrimination on a particular ground?
3) If so, can the perpetrator show that there is justification that will prevent a finding of indirect discrimination?

In practical cases, the first challenge will always be **to find applicable non-discrimination law**. Whether or not any existing Union law applies, depends on the scope of that law. Directives 2000/43 and 2000/78 contain specific provisions on scope with positive and negative elements defining that scope. When called upon to judge on the applicability of non-discrimination law, national courts will have to take these elements into account.

Different aspects of scope must be distinguished: geographical, temporal, personal, and material scope. Of these, the geographical scope is perhaps the least difficult. Distinct from the Union's internal market law, no cross-border element is required. Instead, the two directives are simply meant to apply within the various Member States. With respect to the temporal scope, the period for the implementation of Directives 2000/43 and 2000/78 has long expired. Accordingly, both of them are fully applicable in the Member States. However, challenges may arise in cases where facts from a longer period of time are at issue. The personal scope of Directives 2000/43 and 2000/78 is particularly broad. As stated in Article 3, the Directives apply to all persons, as regards both the public and private sectors, including public bodies.

Serious challenges may, however, arise with respect to the limited material scope in particular of Directive 2000/78, since this Directive aims to prohibit discrimination on the grounds of religion or belief, disability, age or sexual orientation solely as regards employment and occupation. Directive 2000/43 is considerably broader but still limited. The limitations in scope of Directives 2000/43 and 2000/78 means that cases involving alleged discrimination may fall outside the scope of these directives. However blatant the alleged discrimination may then appear to be, such cases will not involve discrimination from the point of view of European Union law. However, the Member States are free to prohibit discrimination on the grounds mentioned in Directives 2000/43 and 2000/78 in fields outside those covered by the directives. Where the national law has a broader material scope than does EU law, a victim of discrimination may be able to find legal redress on that level. Examples of such broader legislation are given in Part E of this report.

With respect to the interpretation of elements that define the scope of Directives 2000/43 and 2000/78, the general approach under EU law, according to which elements that define a right in a positive manner have to be interpreted in a broad manner, whilst elements that limit the right will have to be interpreted in a narrow manner, also applies to scope elements.

Once the applicability of Union non-discrimination law in terms of its scope has been established, the next question is **whether the case at hand *prima facie* involves direct or indirect discrimination**. Here, the Court's case law on the delimitation between the two concepts appears to pose a particular challenge for the national courts, which has led to confusing case law on the national level. It is, however, important that the national courts follow the line set out by the CJEU and provide for the higher degree of protection that comes with the concept of direct discrimination, where that is appropriate based on the facts of a given case.

The **burden of proof for the existence of apparent indirect discrimination** lies with the applicant, who has to 'establish facts from which it may be presumed that there has been [direct or] indirect discrimination' (Article 8(1) Directive 2000/43, Article 10(1) Directive 2000/78). This implies that when identifying the markers relevant for a presumption of discrimination, there must be some relation to the substantive elements of discrimination, i.e. harm (less favourable treatment or disadvantage) and a causal relationship between that harm and the protected ground. The report discusses a number of examples from CJEU case law where these requirements posed serious challenges and, sometimes, unsurmountable difficulties.

Next, indirect discrimination requires **'a particular disadvantage compared with other persons'**, i.e. the detrimental effect must reach a certain level. What this means is not explained further in the directives, and neither can a precise limit be identified on the basis of the case law of the Court of Justice. In *Nikolova*, the Court noted rather generally that indirect discrimination 'is liable to arise when a national measure, albeit formulated in neutral terms, works to the disadvantage of *far more p*ersons possessing the protected characteristic than persons not possessing it' and that the practice in question was 'liable to affect persons possessing such an ethnic origin in *considerably greater proportions* and accordingly to put them at a particular disadvantage compared with other persons'[16] (emphasis added). In contrast, the CJEU has rejected any particular degree of seriousness of group impact as a criterion. It requires impact that is broadly likely to affect persons with a protected characteristic, as compared to other persons.

In practice, an identification of a precise level of disparate impact will often not be necessary. Under the definitions of indirect discrimination in Directives 2000/43 and 2000/78, it is sufficient that the measure in question '*would* put persons [...] at a particular disadvantage' ('liability test', emphasis added). In other words, a potential detrimental effect is sufficient for these purposes. Depending on the circumstances, this may be an easier test than a test based on statistics, since the Court will be able to make a 'common sense assessment' by relying on common knowledge, on obvious facts or on its own conviction or experience.

Accordingly, the assessment of the disparate effect does not necessarily have to be based on quantitative proof (statistics) but may be based on qualitative proof instead. However, this does not mean that statistical proof is irrelevant. The preambles to Directives 2000/43 and 2000/78 state explicitly that the rules of national law or practice may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence. In this context, it is important that any difference in impact between the groups is statistically significant. To obtain statistical proof may pose a number of challenges. Given this situation, the national courts should, wherever possible under national law, apply the liability test which is easier to meet, without, however, excluding statistical proof where it may help the victims of alleged discrimination to show the existence of a disparate impact. In the interest of the effectiveness of the prohibition of indirect discrimination, it is recommended that Member State legislators do not make statistical proof compulsory. In the part on national law, the report mentions the French *Méthode Clerc* as an example of good practice in relation to statistics: it allows for the collection of data while respecting the requirements of data protection law.

On a proper understanding, a **finding of indirect discrimination does not require the comparability of the situations** of those benefiting from the advantageous treatment and of those who suffer from the disadvantageous treatment. In this respect, a challenge arises out of the fact that the CJEU occasionally allows for comparability to be taken into account. In order to avoid the danger of undermining the effectiveness of the prohibition of indirect discrimination, it is important that national authorities and courts are particularly careful about the issue of comparability.

Once the applicant has succeeded in showing facts from which it may be presumed that there has been indirect discrimination, it is **for the respondent to prove that there has been no breach of**

16 CJEU, Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia (third parties: Anelia Nikolova, Darzhavna Komisia za energiyno i vodno regulirane)*, 16 July 2015, ECLI:EU:C:2015:480 (Grand Chamber), paragraphs 101 and 107.

the principle of equal treatment. In this context, the respondent can try to rebut the presumption of discrimination by negating the harm or the causal relationship between the harm and the discrimination ground. If that is not successful, the respondent can try to put forward justification for the presumed discrimination. The latter involves a legitimate aim and a proportionate measure. Again, in the context of the open category of objective justification that is part of the definition of indirect discrimination, establishing the former is easier than the latter.

In practice, a particular challenge for the national courts lies in the fact that CJEU case law in the preliminary ruling procedure under Article 267 TFEU may go no further than leading the referring court through the issues that it must address in the context of objective justification, leaving the actual assessment to the national court. The national courts do well to take the restrictive nature of derogations from the prohibition of discrimination seriously and to refrain from accepting objective justifications too easily.

A particular challenge presents itself where the justification relied on relates to **a right of the alleged discriminator that competes or conflicts with a right of the victim of the alleged discrimination**. Directive 2000/78 contains provisions relating to this problem. First, Article 2(5) states that the Directive is without prejudice to 'measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and *for the protection of the rights and freedoms of others*' (emphasis added). Further, Article 4(2) concerns occupational requirements in relation to activities within churches and other public or private organisations the ethos of which is based on religion or belief. In contrast, Directive 2000/43 does not contain any corresponding rules. Here, a parallel may perhaps be drawn with CJEU case law in the field of free movement, according to which the protection of fundamental rights may justify restrictions of free movement.[17]

The Court's decisions in the headscarf cases confirm that the matter of conflicting rights is to be analysed in the context of justification. In *WABE and Müller*,[18] the Court emphasises the need to balance competing rights in the following manner:

> '[W]hen several fundamental rights and principles enshrined in the Treaties are at issue, such as, in the present case, the principle of non-discrimination enshrined in Article 21 of the Charter and the right to freedom of thought, conscience and religion guaranteed in Article 10 of the Charter, on the one hand, and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions recognised in Article 14(3) of the Charter and the freedom to conduct a business recognised in Article 16 of the Charter, on the other hand, the assessment of observance of the principle of proportionality must be carried out in accordance with the need to reconcile the requirements of the protection of those various rights and principles at issue, striking a fair balance between them [...]."

The Court's approach in the case law on religious clothing has been much criticised in academic writing, for giving too much weight to the employer's rights. However, it should be noted that the Court has become stricter in terms of the test that must be applied. Indeed, the employer must demonstrate a genuine need in this respect. Accordingly, when national courts examine a case where different rights compete, they must engage in a particularly careful analysis of the proportionality of the restricting action.

A final challenge to be mentioned concerns **situations of multiple discrimination**. The fact that people have multiple identities means that discrimination cases may involve several discrimination grounds at once. This is recognised in Directives 2000/43 and 2000/78, where the preambles refer (specifically) to

17 See, e.g. CJEU, Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, 11 December 2007, ECLI:EU:C:2007:772 (Grand Chamber).

18 CJEU, Joined Cases C-804/18 and C-341/19 *IX v WABE eV and MH Müller Handels GmbH v MJ*, 15 July 2021, ECLI:EU:C:2021:594 (Grand Chamber), paragraph 84. At the time of writing this report, a further case is pending, namely CJEU, Case C-344/20 *L.F. v SCRL*.

the fact that women are often the victims of multiple discrimination (recitals 14 and 3 of the preambles of Directives 2000/43 and 2000/78, respectively). The importance of multiple discrimination has also been acknowledged by the European Commission.[19]

Challenges may arise because multiple discrimination can raise complex issues which relate, among other things, to the exhaustive list of discrimination grounds, differing scopes as well as differing defences and derogations under the various instruments of EU law. In addition, the CJEU has held that only certain situations are covered by Union law. According to the Court, discrimination may indeed be based on several of the grounds that are protected under EU law, but EU law does not provide a basis for the recognition of intersectional discrimination; in fact, 'no new category of discrimination resulting from the combination of more than one of those grounds may be found to exist where discrimination on the basis of those grounds taken in isolation has not been established'.[20] In other words, the Court excludes intersectional discrimination from the reach of Directives 2000/43 and 2000/78. Moreover, the Court's approach in the context of actual cases of multiple discrimination so far has not been particularly helpful.

Importantly, the Court's rigid attitude to intersectional discrimination does not *oblige* the Member States to follow this approach. Instead, the Member States are free to provide meaningful protection against intersectional discrimination. In doing so, they can look to a number of interesting approaches that have been developed in other legal orders, both international and national, as well as in academic writing. Examples are given in the report, including a useful case from France that is discussed in Part E, on national legislation and case law.

The report's **part on national legislation and case law** begins by providing a comparison among the national laws of the Member States in relation to the definitions of indirect discrimination (some of which differ from the definition in Directives 2000/43 and 2000/78), the discrimination grounds covered (often more than those covered by the two directives) and the material scope of the law (often broader than that of the directives and notably than Directive 2000/78). Further, this part of the report looks at problems and good practices reflected in the national case law, as already indicated.

The **report concludes** that although the concept of indirect discrimination holds great potential, it appears that it is often insufficiently understood and applied in the Member States of the European Union. On the one hand, the Member States are bound by Union law. Notably, they are obliged to adhere to the Court's case law on the relevance of the concept of direct rather than indirect discrimination, thereby providing for a higher degree of protection, where this is called for in view of the facts of a given case. On the other hand, the Member States should make use of the freedom left to them by Union law in order to strengthen the prohibition of discrimination, either by adopting more favourable rules on matters covered by the directives or by providing extra protection in fields outside them.

19 European Commission (2007) *Tackling Multiple Discrimination. Practices, policies and laws*, Luxembourg: Office for Official Publications of the European Communities, p. 5; and Report from the European Commission to the European Parliament and the Council on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('the Racial Equality Directive') and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ('the Employment Equality Directive'), COM(2021) 139 final, p. 4 and following.

20 CJEU, Case C-443/15 *David L. Parris v Trinity College Dublin, Higher Education Authority, Department of Public Expenditure and Reform, Department of Education and Skills,* 24 November 2016, ECLI:EU:C:2016:897, paragraph 80.

Résumé

Qu'est-ce que la discrimination indirecte? Ce concept désigne des mesures qui sont neutres en apparence par rapport à un motif de discrimination interdit par la législation et ne semblent dès lors poser aucun problème, mais qui n'en ont pas moins, selon la situation des personnes auxquelles elles s'appliquent, un effet préjudiciable sur les titulaires d'une protection par rapport au dit motif, sans pouvoir être justifiées. En d'autres termes, il s'agit de mesures qui semblent acceptables sur le plan abstrait mais qui s'avèrent problématiques sur le plan concret en raison de leur effet disparate.

Le caractère indirect de la discrimination est déterminé par le type de lien entre un traitement donné et un motif particulier de discrimination. La discrimination indirecte est liée sur le fond (plutôt que sur la forme) à un motif interdit de discrimination. Elle n'apparaît pas de manière évidente mais revêt plutôt un caractère implicite. Sa nature indirecte ne signifie pas pour autant que les victimes de discrimination en soient moins affectées. En réalité, une victime individuelle de discrimination indirecte souffre tout autant qu'une victime de discrimination directe. Dans un cas comme dans l'autre, une atteinte est portée aux droits et aux opportunités ainsi qu'à la situation socio-économique, au bien-être et à la santé. Dans le cadre plus spécifique du droit de l'UE, la Cour de justice de l'Union européenne (CJUE) a déclaré que la discrimination en général «peut compromettre la réalisation des objectifs du TFUE [traité sur le fonctionnement de l'Union européenne], notamment un niveau d'emploi et de protection sociale élevé, le relèvement du niveau et de la qualité de la vie, la cohésion économique et sociale, la solidarité ainsi que l'objectif de développer l'Union en tant qu'espace de liberté, de sécurité et de justice».[1]

L'expérience montre hélas que la notion de discrimination indirecte est souvent incomprise, parfois même non acceptée ni reconnue. Son application concrète se heurte en outre à de nombreuses difficultés. Dans une récente évaluation de la mise en œuvre des directives 2000/43[2] et 2000/78[3] dans les États membres de l'UE, la Commission européenne constate «une faible sensibilisation à la discrimination indirecte ainsi qu'une application limitée de cette notion dans la pratique judiciaire nationale».[4]

Ce constat se trouve confirmé dans le présent rapport, qui actualise un rapport antérieur intitulé *Limites et potentiel du concept de discrimination indirecte* et rédigé en 2008 pour le Réseau européen des experts juridiques en matière de non-discrimination (son appellation à l'époque).[5] La présente version procède à la mise à jour de la précédente à la lumière des évolutions intervenues dans la jurisprudence de la CJUE relative aux directives 2000/43 et 2000/78 tout en tenant compte également des évolutions au niveau du droit international relatif aux droits de l'homme ainsi qu'au niveau du droit national des États membres de l'UE.

Le droit de l'UE doit être envisagé dans cette perspective et dans le contexte du droit international en général. Le présent rapport évoque brièvement trois **instruments internationaux en matière de droits de l'homme** plus particuliers des Nations unies, à savoir la convention sur l'élimination de

1 CJUE, affaires jointes C-804/18 et C-341/19 *IX contre WABE eV et MH Müller Handels GmbH contre MJ*, 15 juillet 2021, ECLI:EU:C:2021:594 (grande chambre), point 62.

2 Directive 2000/43/CE du Conseil du 29 juin 2000 relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de race ou d'origine ethnique, JO 2000 L 180, p. 22.

3 Directive 2000/78/CE du Conseil du 27 novembre 2000 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail, JO 2000 L 303, p.16.

4 Rapport de la Commission européenne au Parlement européen et au Conseil sur l'application de la directive 2000/43/CE du Conseil relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de race ou d'origine ethnique (directive sur l'égalité raciale) et de la directive 2000/78/CE du Conseil portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail (directive sur l'égalité en matière d'emploi), COM(2021) 139 final, p. 4.

5 Tobler, C. (2008) *Limites et potentiel du concept de discrimination indirecte*, Réseau européen des experts juridiques en matière de non-discrimination, Luxembourg: Office des publications officielles des Communautés européennes.

toutes les formes de discrimination raciale (CERD), la convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes (CEDAW) et la convention relative aux droits des personnes handicapées (CRDPH – convention qui revêt une importance particulière dans le cadre du droit de l'Union européenne du fait que celle-ci en est elle-même partie). Toutes ces conventions interdisent non seulement la discrimination directe mais également la discrimination indirecte. Il en va de même de la convention européenne des droits de l'homme (CEDH) du Conseil de l'Europe, bien que le développement initial du concept ait été dans ce cas beaucoup plus lent et plus hésitant qu'en droit de l'UE.

Le droit international relatif aux droits de l'homme reconnaît que les causes de discrimination sont souvent de nature structurelle. Allant au-delà de cette reconnaissance, plusieurs conventions obligent explicitement les États parties à rechercher une égalité transformative. Les dispositions dans ce sens sont la conséquence logique de l'interdiction de toutes les formes de discrimination, en ce compris notamment la discrimination indirecte. Lorsque des problèmes structurels sont en jeu dans une société particulière, il ne suffit pas d'interdire ce type de discrimination et de faire amende honorable dans des cas individuels: il convient impérativement de s'attaquer à leurs causes profondes en agissant de façon proactive et globale.

En ce qui concerne l'UE, l'interdiction de discrimination indirecte s'inscrit dans **une approche multidimensionnelle plus large du droit européen en matière d'égalité ou de non-discrimination**. D'une part, le système comporte des principes généraux d'égalité ou de non-discrimination – désormais consacrés également par la Charte des droits fondamentaux (CDF) de l'Union – qui sont d'application dans tous les domaines du droit de l'UE. D'autre part, il contient, en matière d'égalité et de non-discrimination, des dispositions légales à la fois au niveau du droit primaire en dehors de la Charte et au niveau du droit dérivé de l'Union qui s'appliquent dans des domaines déterminés (et le plus souvent limités).

Depuis la révision du traité de Lisbonne, entré en vigueur le 1er décembre 2009, la Charte des droits fondamentaux bénéficie du même statut juridique que les traités. Elle lie les institutions, organes, bureaux et agences de l'UE pour toutes leurs actions, et elle lie les États membres lorsqu'ils agissent dans le champ d'application du droit de l'Union. Il est important de souligner que cette dernière condition signifie que les dispositions de la Charte ne sont pas indépendantes mais s'appliquent uniquement dans le cadre d'autres dispositions législatives de l'Union – ce qui limite par ailleurs le potentiel lié au fait que, tout comme l'article 14 de la CEDH et à l'inverse du droit de l'UE autre que la CDF, la disposition relative à la non-discrimination visée à l'article 21 de la CDF prévoit une liste ouverte de motifs de discrimination («notamment»).

En termes d'effet pratique pour les particuliers, en cas de conflit entre le droit national des États membres et le droit de l'Union, et lorsque le conflit ne peut être évité en interprétant le droit national conformément à celui de l'UE, les dispositions de la Charte peuvent être invoquées en dernier recours par les personnes concernées. Il convient à cette fin qu'une disposition déterminée suffise à elle seule à conférer des droits aux particuliers et qu'elle ne doive pas être davantage précisée par des dispositions du droit de l'UE ou du droit national. Tel est notamment le cas de l'article 21 de la CDF. Il peut être invoqué dans des situations horizontales (à savoir dans des affaires impliquant des particuliers à la fois en tant que demandeurs et en tant que défendeurs) mais ne sera pas nécessaire dans des situations verticales (à savoir les affaires dans lesquelles des particuliers sont les demandeurs et l'État est le défendeur) mettant en jeu des dispositions des directives européennes produisant des effets directs, car ce sont alors les dispositions pertinentes des directives qui peuvent être invoquées.

Les directives 2000/43 et 2000/78 font partie du droit de l'UE en matière d'égalité ou de non-discrimination. Elles concrétisent, dans leurs domaines d'application respectifs, le principe général/droit conféré par la CDF de/à l'égalité et la non-discrimination. Elles lient les États membres, qui doivent veiller à ce que leur droit national soit conforme aux dispositions qu'elles contiennent. Elles se fondent sur une liste fermée de motifs de discrimination et ne peuvent être étendues par l'addition de motifs supplémentaires par voie d'interprétation. Il arrive cependant que la notion de discrimination indirecte puisse permettre de faire

valoir en tant que critère interdit des critères appliqués à un traitement particulier. Les États membres sont libres en outre d'ajouter des motifs de discrimination dans leur législation nationale. Des exemples d'approches plus larges et, de façon plus générale, d'approches plus utiles (bonnes pratiques notamment) en vigueur dans les États membres et susceptibles de servir de références pour l'application du concept de discrimination indirecte, sont fournis à la partie E du présent rapport, consacrée à la législation et la jurisprudence nationales.

Le concept de discrimination indirecte peut être décrit comme ayant une **double fonction en droit de l'UE**: améliorer l'efficacité de l'interdiction de discrimination, d'une part, et, d'autre part, donner plus de visibilité aux causes sous-jacentes de discrimination, souvent de nature structurelle ou systémique, en vue de les éradiquer. La discrimination indirecte est l'une des formes de discrimination énumérées dans les directives 2000/43 et 2000/78, aux côtés de la discrimination directe, de l'injonction de discriminer et du harcèlement.

En ce qui concerne la **signification du concept de discrimination indirecte**, son élément le plus caractéristique est assurément sa focalisation sur l'effet préjudiciable de la mesure plutôt que sur son apparence extérieure (ou sur une intention quelconque de la part de l'auteur de la discrimination). Au sens de cette notion, l'effet préjudiciable conduit à constater une discrimination apparente ou *prima facie* (*à première vue*), autrement dit à présumer l'existence d'une discrimination indirecte susceptible d'être réfutée. La décision finale quant à l'existence d'une discrimination d*é*pend de l'absence de toute justification, qu'elle soit objective au sens de la définition juridique de la discrimination indirecte ou qu'elle soit réglementaire (*à savoir* qu'il s'agit d'un motif de justification spécifiquement établi par la loi).

Le point de départ de tout constat de discrimination indirecte consiste à apprécier dans quelle mesure son fondement diffère formellement d'un critère interdit de discrimination (la CJUE a néanmoins marqué un tournant majeur puisque le fait d'invoquer un motif formellement différent n'exclut pas nécessairement un constat de discrimination directe, comme indiqué plus loin). Lorsqu'une mesure véritablement «neutre en apparence» est en cause, ce sont les circonstances – à la fois légales et factuelles – qui détermineront si la mesure en question laisse présumer l'existence d'une discrimination indirecte. Tel sera le cas si ladite mesure a, réellement ou potentiellement, un effet préjudiciable significatif sur les personnes devant être protégées par rapport à d'autres personnes. La mesure en question est alors neutre «en apparence» seulement.

En vertu de l'article 2, paragraphe 2, sous b), de la directive 2000/78, le concept de discrimination indirecte exige que la mesure en question soit susceptible d'entraîner «un désavantage particulier pour des personnes d'une religion ou de convictions, d'un handicap, d'un âge ou d'une orientation sexuelle *donnés*» (italiques ajoutés). L'article 2, paragraphe 2, sous b), de la directive 2000/43 désigne pour sa part «des personnes d'une race ou d'une origine ethnique donnée». Suscitant une certaine confusion, la jurisprudence de la CJUE relative à l'exigence que le motif particulier de discrimination appartienne à une sous-catégorie «donnée» semble différer selon le motif de discrimination. A ce jour, la Cour a uniquement insisté sur cet élément pour certains motifs (la race ou l'origine ethnique ainsi que la religion), ce qui limite, de toute évidence, le concept de discrimination indirecte. Les législations nationales de certains États membres omettent parfois le terme «donné», ce qui peut donner lieu à un niveau de protection plus élevé. Une telle éventualité existe également en droit de l'UE du fait que les deux directives ne contiennent que des exigences minimales.

Une mesure apparemment neutre ayant un effet disparate constitue une discrimination indirecte uniquement si elle n'est pas objectivement justifiée ou si elle ne relève pas d'une dérogation réglementaire. La justification objective veut tout d'abord que la mesure donnant lieu à une apparence de discrimination indirecte ait un but légitime. Il s'agit d'un concept ouvert qui ne repose pas sur une liste limitée de motifs, ce qui signifie qu'il existe potentiellement un large éventail de motifs admissibles. La jurisprudence récente de la Cour insiste cependant sur le fait qu'un but n'est légitime qu'à condition de répondre à une véritable nécessité. Les moyens choisis pour y parvenir doivent en outre être proportionnés, à savoir

appropriés et nécessaires. Une mesure est appropriée pour autant qu'elle soit adaptée à la réalisation du but visé. Il est important de noter que tel peut uniquement être le cas si ce but est véritablement poursuivi de manière cohérente et systématique. Une mesure prise est considérée comme nécessaire ou requise lorsqu'aucune mesure ayant moins d'effet disparate, ou sans effet disparate, ne permet pas d'atteindre l'objectif. La Cour insiste sur le fait que la mesure choisie doit se limiter au strict nécessaire.

De façon générale, la jurisprudence montre que la CJUE admet relativement facilement qu'un but donné est, en soi, légitime – mais que la grande difficulté consiste plutôt à déterminer ensuite la proportionnalité de la mesure choisie pour y parvenir (autrement dit à établir le caractère approprié et nécessaire de la mesure).

La discrimination indirecte doit être distinguée d'autres concepts juridiques pertinents dans le cadre des directives 2000/43 et 2000/78. Aussi le rapport se penche-t-il sur le lien entre le concept de discrimination indirecte et les concepts de discrimination par association (laquelle concerne la personne affectée par la discrimination), d'action positive (que les directives mentionnent en tant que simple possibilité pour les États membres), d'obligations positives (qui figurent dans certains cas de jurisprudence de la CJUE), d'aménagement raisonnable pour des personnes handicapées (prévu par la directive 2000/78 et susceptible d'empêcher la constatation d'une discrimination) et de discrimination directe.

Telle que développée par la jurisprudence de la Cour, la distinction entre discrimination directe et indirecte s'avère particulièrement importante, mais également complexe. Les deux concepts sont des contreparties logiques. Il est important de les différencier pour des raisons pratiques: premièrement, il y a, dans la plupart des cas, moins de motifs pour justifier une discrimination directe qu'une discrimination indirecte, étant donné que la première peut uniquement être justifiée, en droit de l'UE, sur la base des motifs énoncés dans la loi (causes légales de justification); deuxièmement, il existe, en ce qui concerne la discrimination indirecte, une possibilité supplémentaire de faire valoir une justification objective.

Lorsqu'il s'agit de discrimination directe, il existe généralement un lien étroit avec le motif de la discrimination. En fait, ce lien va de soi lorsque le motif interdit est expressément invoqué. A l'inverse, lorsqu'il s'agit de discrimination indirecte, le lien avec le motif de la discrimination est comparativement moins évident du fait qu'il requiert des considérations supplémentaires quant aux *effets* de la mesure. Il est courant en cas de discrimination indirecte que le groupe défavorisé ne soit pas constitué de façon exclusive, mais de façon prédominante seulement, de personnes protégées par rapport au motif de discrimination en cause. En conséquence, ces personnes se trouvent «simplement» représentées de manière disproportionnée au sein du groupe désavantagé.

Il peut arriver, en vertu de la jurisprudence actuelle de la Cour, que le recours à des critères apparemment neutres doive encore être évalué sous l'angle de la discrimination directe. Deux courants jurisprudentiels peuvent être discernés: le premier, qui est dominant, se concentre sur le caractère inextricable et indissociable du lien entre la nature d'un critère formellement neutre et un motif interdit de discrimination: lorsqu'un critère de ce type est appliqué, le cadre d'analyse qu'il convient d'utiliser est la discrimination directe (plutôt qu'indirecte). Plusieurs cas illustrent cette approche. Le second courant, moins important en termes numériques, se concentre sur les raisons pour lesquelles un traitement moins avantageux donné est réservé à certaines personnes ou à certains groupes de personnes: lorsqu'il peut être prouvé que ces raisons sont liées à un motif interdit de discrimination, le cadre d'analyse à utiliser est, dans ce cas également, la discrimination directe (plutôt qu'indirecte).

En vertu de la jurisprudence de la CJUE, **des critères formellement neutres qui sont néanmoins «indissociablement» ou «inextricablement» liés à un motif interdit de discrimination** doivent être évalués dans le cadre d'une discrimination directe plutôt qu'indirecte. Dans l'arrêt de principe *Szpital Kliniczny*,[6]

6 CJUE, affaire C-16/19 *VL contre Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, 26 janvier 2021, ECLI:EU:C:2021:64 (grande chambre), point 48.

qui porte sur une discrimination fondée sur un handicap, la Cour énonce comme suit la manière de déterminer l'existence d'une discrimination directe: «[...] lorsqu'un employeur traite un travailleur de manière moins favorable qu'un autre de ses travailleurs ne l'est, ne l'a été ou ne le serait dans une situation comparable et qu'il s'avère, au regard de l'ensemble des circonstances pertinentes de l'espèce, que ce traitement défavorable est opéré sur la base du handicap de ce premier travailleur, en ce qu'il repose sur *un critère indissociablement lié à ce handicap*, un tel traitement est contraire à l'interdiction de discrimination directe énoncée à l'article 2, paragraphe 2, sous a), de la directive 2000/78» (italiques ajoutés).

Il découle de ce qui précède qu'un critère formellement neutre qui, en raison de circonstances supplémentaires, est néanmoins inextricablement lié à un motif de discrimination, doit être considéré comme étant «fondé sur» ce motif. En conséquence, le cadre de la discrimination directe est pertinent pour l'analyse. Le cadre de la discrimination indirecte est uniquement pertinent lorsque tel n'est pas le cas, la Cour décrivant cette forme de discrimination comme associée à «des critères non liés à la caractéristique protégée»:

> «S'agissant [...] de la question de savoir si une pratique telle que celle en cause au principal constitue une discrimination indirecte au sens de l'article 2, paragraphe 2, sous b), de la directive 2000/78, il ressort de la jurisprudence de la Cour qu'une telle discrimination peut résulter d'une mesure qui, bien que formulée de manière neutre, c'est-à-dire par référence à des critères non liés à la caractéristique protégée, conduit toutefois à désavantager particulièrement les personnes possédant cette caractéristique [...]».[7]

Le rapport examine également de façon assez détaillée les précédents arrêts de la CJUE ayant conduit à celui prononcé dans l'affaire *Szpital Kliniczny.*

Dans un second courant jurisprudentiel, moins marqué, la Cour a considéré qu'une mesure est constitutive d'une discrimination directe lorsqu'il s'avère qu'elle a été «**instituée et/ou maintenue pour des raisons liées à» un motif interdit de discrimination**.[8] Plus loin dans le même arrêt, la Cour oppose comme suit la discrimination directe et la discrimination indirecte:

> '[I]l convient de rappeler que, ainsi qu'il ressort de la réponse apportée aux deuxième à quatrième questions, s'il apparaît qu'une mesure qui engendre une différence de traitement a été *instituée pour des raisons liées à la race ou à l'origine ethnique*, une telle mesure doit être qualifiée de «discrimination directe», au sens de l'article 2, paragraphe 2, sous a), de la directive 2000/43. En revanche, une discrimination indirecte fondée sur la race ou l'origine ethnique n'exige pas qu'une motivation de ce type figure à la base de la mesure en cause. En effet, ainsi qu'il ressort de la jurisprudence rappelée au point 94 du présent arrêt, pour qu'une mesure puisse relever de l'article 2, paragraphe 2, sous b), de la directive 2000/43, il suffit que bien qu'ayant recours à des critères neutres non fondés sur la caractéristique protégée, ladite mesure ait pour *effet* de désavantager particulièrement les personnes possédant cette caractéristique.»[9]

Ci-après une tentative de synthèse de la jurisprudence toujours plus complexe de la Cour, telle qu'elle se présente à l'heure d'écrire ces lignes, concernant la délimitation entre discrimination directe et discrimination indirecte applicable aux directives 2000/43 et 2000/78:

7 CJUE, affaire C-16/19 VL contre Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie, 26 janvier 2021, ECLI:EU:C:2021:64 (grande chambre), point 55.

8 CJUE, affaire C-83/14 *CHEZ Razpredelenie Bulgaria AD contre Komisia za zashtita ot diskriminatsia (en présence de: Anelia Nikolova, Darzhavna Komisia za energiyno i vodno regulirane)*, 16 juillet 2015, ECLI:EU:C:2015:480 (grande chambre), point 91.

9 CJUE, affaire C-83/14 CHEZ Razpredelenie Bulgaria AD contre Komisia za zashtita ot diskriminatsia (en présence de: Anelia Nikolova, Darzhavna Komisia za energiyno i vodno regulirane), 16 juillet 2015, ECLI:EU:C:2015:480 (grande chambre), points 95 et 96.

Discrimination directe:

- Le concept de discrimination directe s'applique dans tous les cas où il est fait *expressément usage* d'un motif interdit de discrimination. Il s'agit en réalité de la qualification permettant d'établir le plus aisément la nature directe d'une discrimination. Dans la jurisprudence moderne de la Cour, la grande majorité des affaires de discrimination directe concernent des différenciations fondées sur l'âge.
- Le concept de discrimination directe s'applique aussi s'il peut être prouvé qu'un critère, même formellement neutre, a été *adopté pour des raisons liées à un motif interdit de discrimination* (*Nikolova*).
- Le concept de discrimination directe s'applique en outre lorsque le critère utilisé est *indissociablement et inextricablement lié* à un motif interdit de discrimination (comme le confirme plus particulièrement l'arrêt *Szpital Kliniczny*). Il apparaît que la Cour met l'accent, dans ce contexte, sur l'effet d'exclusion du critère en question: soit toutes les personnes défavorisées par le critère appartiennent au même groupe protégé (*Nikoloudi,*[10] *Kleist,*[11] *Andersen,*[12] *Maruko,*[13] *Römer*)[14], soit ce groupe inclut des personnes totalement exclues dans ce sens qu'elles ne pourront pas satisfaire au critère en cause (*Hay*).[15]

Discrimination indirecte:

- Le concept de discrimination indirecte s'applique pour tout autre critère formellement neutre, ostensiblement neutre ou neutre à première vue. Tant les groupes favorisés que les groupes défavorisés seront ici hétérogènes.

La suite du rapport s'intéresse à diverses **difficultés rencontrées dans l'application pratique du concept de discrimination indirecte**. Lors de l'utilisation concrète du concept de discrimination indirecte, l'examen de l'affaire concernée doit systématiquement prévoir une analyse en trois étapes portant sur 1) le champ d'application du droit, 2) la nature de la mesure assimilée à une discrimination indirecte apparente (ou à première vue), et 3) une justification objective ou réglementaire. Il convient, dans le cadre de cette analyse, de poser les questions suivantes et d'y répondre:

1) L'affaire entre-t-elle dans le champ d'application de la législation en matière de non-discrimination en vigueur dans l'État membre de l'UE concerné, autrement dit du droit national considéré à la lumière du droit de l'UE?
2) Dans l'affirmative, la victime de la discrimination alléguée peut-elle démontrer l'existence d'une discrimination indirecte apparente fondée sur un motif particulier?
3) Dans l'affirmative, l'auteur peut-il démontrer l'existence d'une justification qui empêchera de conclure à une discrimination indirecte?

Concrètement, la première difficulté consiste toujours à **trouver la législation applicable en matière de non-discrimination** car son champ d'application détermine si une législation de l'Union est, ou non, d'application. Les directives 2000/43 et 2000/78 contiennent des dispositions spécifiques concernant le champ d'application, lequel est défini sur la base d'éléments positifs et d'éléments négatifs. Les juridictions nationales sont tenues de prendre ces éléments en compte lorsqu'elles sont appelées à statuer sur l'applicabilité de la législation en matière de non-discrimination.

10 CJUE, affaire C-196/02 *Vasiliki Nikoloudi contre Organismos Tilepikoinonion Ellados AE*, 10 MARS 2005, ECLI:EU:C:2005:141.
11 CJUE, affaire C-356/09 *Pensionsversicherungsanstalt contre Christine Kleist,* 18 novembre 2010, ECLI:EU:C:2010:703.
12 CJUE, affaire C-499/08 *Ingeniørforeningen i Danmark, agissant pour Ole Andersen, contre Region Syddanmark,* 12 octobre 2010, ECLI:EU:C:2010:600 (grande chambre).
13 CJUE, affaire C-267/06 *Tadao Maruko contre Versorgungsanstalt der deutschen Bühnen*, 1er avril 2008, ECLI:EU:C:2008:179 (grande chambre).
14 CJUE, affaire C-147/08 *Jürgen Römer contre Freie und Hansestadt Hamburg,* 10 mai 2011, ECLI:EU:C:2011:286 (grande chambre).
15 CJUE, affaire C-267/12 *Frédéric Hay contre Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, 12 décembre 2013, ECLI:EU:C:2013:823.

Il convient de distinguer divers aspects du champ d'application: géographique, temporel, personnel et matériel – parmi lesquels le champ d'application géographique est sans doute celui qui suscite le moins de difficulté: distinct du droit du marché intérieur de l'Union, il ne fait intervenir aucun élément transfrontalier, les deux directives étant simplement destinées à s'appliquer dans les différents États membres. En ce qui concerne le champ d'application temporel, la période de mise en œuvre des directives 2000/43 et 2000/78 est échue depuis longtemps. En conséquence, toutes deux sont pleinement applicables dans les États membres. Des difficultés peuvent néanmoins surgir lorsque les faits en cause concernent une période plus longue. Le champ d'application personnel des directives 2000/43 et 2000/78 est particulièrement vaste. Comme le précise leur article 3, elles s'appliquent à toutes les personnes, tant pour le secteur public que pour le secteur privé, y compris les organismes publics.

D'importantes difficultés peuvent cependant survenir en raison du champ d'application matériel limité de la directive 2000/78 notamment, étant donné que celle-ci vise à interdire la discrimination fondée sur la religion ou les convictions, un handicap, l'âge ou l'orientation sexuelle en matière d'emploi et de travail uniquement. La directive 2000/43 est sensiblement plus large à cet égard, tout en restant limitée. Cette limitation de leur champ d'application peut faire en sorte que les directives 2000/43 et 2000/78 ne puissent être invoquées en cas de présomption de discrimination. Aussi flagrante que puisse paraître la discrimination alléguée dans de tels cas, ces derniers ne seront pas considérés, aux yeux du droit de l'Union européenne, comme impliquant une discrimination. Les États membres sont toutefois libres d'interdire la discrimination fondée sur les motifs énoncés dans les directives 2000/43 et 2000/78 dans d'autres domaines que ceux visés par ces directives. Lorsque la législation nationale a un champ d'application matériel plus étendu que le droit de l'UE, il est possible pour la victime d'obtenir réparation par voie judiciaire à ce niveau. Des exemples de ce type de législation plus large sont fournis à la partie E du présent rapport.

Pour ce qui concerne l'interprétation des éléments qui définissent le champ d'application des directives 2000/43 et 2000/78, l'approche générale de l'ordre juridique européen, selon laquelle il convient d'interpréter au sens large les éléments qui définissent un droit de manière positive et au sens strict les éléments qui le restreignent, s'applique également aux éléments relatifs au champ d'application.

Une fois établie l'applicabilité de la législation de l'Union en termes de champ d'application, la question est de savoir **si le cas en question implique à première vue une discrimination directe ou indirecte**. La jurisprudence de la Cour relative à la délimitation entre les deux concepts semble poser ici une difficulté particulière pour les juridictions nationales – ce qui a donné lieu à une jurisprudence confuse au niveau national. Il est cependant important que les juridictions nationales suivent la ligne tracée par la CJUE et assurent le niveau supérieur de protection associé au concept de discrimination directe lorsque cela s'avère approprié au vu des faits du cas d'espèce.

La **charge de la preuve quant à l'existence d'une discrimination indirecte apparente** incombe au requérant, qui doit établir «des faits qui permettent de présumer l'existence d'une discrimination [directe ou] indirecte» (article 8, premier paragraphe, de la directive 2000/43, et article 10, paragraphe premier, de la directive 2000/78). Il en découle que, lors de l'identification d'indications pertinentes au titre d'une présomption de discrimination, un lien doit être établi avec les éléments de fond d'une discrimination, à savoir un préjudice (traitement moins favorable ou désavantage) ainsi qu'une relation causale entre le préjudice et le motif protégé. Le rapport analyse une série d'exemples tirés de la jurisprudence de la CJUE qui illustrent les défis, voire les difficultés insurmontables, posés par ces exigences.

La discrimination indirecte exige ensuite «**un désavantage particulier par rapport à d'autres personnes**», à savoir un effet préjudiciable d'une certaine ampleur. Cette condition n'est pas explicitée davantage dans les directives, et la jurisprudence de la Cour de justice ne permet pas non plus de déterminer un seuil précis. Dans l'arrêt *Nikolova*, la Cour note de manière assez générale qu'une discrimination indirecte «est susceptible de se présenter lorsque l'application d'une mesure nationale, bien que formulée de façon neutre, désavantage en fait un nombre *beaucoup plus élevé* de titulaires

de la caractéristique personnelle protégée que de personnes ne possédant pas celle-ci» et «qu'une telle pratique est de nature à affecter dans des *proportions considérablement plus importantes* les personnes ayant une telle origine ethnique et à entraîner dès lors un désavantage particulier pour les personnes ayant une telle origine ethnique par rapport à d'autres personnes»[16] (italiques ajoutés). Par contre, la CJUE a rejeté, en tant que critère, un degré précis de gravité de l'effet sur un groupe. Son exigence porte sur un effet globalement susceptible d'affecter davantage les titulaires d'une caractéristique protégée que d'autres personnes.

Dans la pratique, il ne s'avère pas souvent nécessaire de déterminer un niveau précis d'effet disparate. Il suffit, en vertu des définitions de la discrimination indirecte figurant dans les directives 2000/43 et 2000/78, que la mesure soit «*susceptible* d'entraîner un désavantage particulier» (italiques ajoutés) («test de probabilité»). Autrement dit, un effet préjudiciable potentiel suffit à cette fin – un test qui peut, selon les circonstances, s'avérer plus aisé qu'un test basé sur des statistiques, étant donné que la Cour pourra procéder à une «évaluation de sens commun» en s'appuyant sur ce qui est de notoriété publique, sur des évidences ou sur sa propre conviction ou expérience.

L'évaluation de l'effet disparate ne doit donc pas nécessairement se fonder sur une preuve quantitative (statistiques) mais peut s'appuyer plutôt sur une preuve qualitative. Cela ne signifie pas pour autant qu'une preuve statistique soit sans pertinence. Les préambules respectifs des directives 2000/43 et 2000/78 stipulent explicitement que les règles du droit national ou des pratiques nationales peuvent prévoir, en particulier, que la discrimination indirecte puisse être établie par tous moyens, y compris sur la base de données statistiques. Il est important, dans ce contexte, que toute disparité d'effet entre les groupes soit statistiquement significative. L'obtention de preuves statistiques peut se heurter à plusieurs difficultés. Face à cette situation, il conviendrait que les juridictions nationales appliquent, dans tous les cas où la législation nationale le permet, le test de probabilité, plus facile à réaliser – sans exclure pour autant les preuves statistiques susceptibles d'aider les victimes de discrimination présumée à démontrer l'existence d'un effet disparate. Il est recommandé aux législateurs des États membres, dans l'intérêt de l'efficacité de l'interdiction de discrimination indirecte, de ne pas rendre la preuve statistique obligatoire. Dans sa partie consacrée au droit national, le rapport cite la méthode Clerc, française, en tant qu'exemple de bonne pratique en matière de statistiques: elle permet la collecte de données tout en respectant les exigences de la législation sur la protection de celles-ci.

Selon une lecture correcte, le constat de l'existence d'une discrimination indirecte ne requiert pas la comparabilité des **situations respectives de ceux qui bénéficient du traitement favorable et de ceux qui subissent le traitement défavorable**. Il peut dès lors s'avérer déroutant que la CJUE permette occasionnellement que la comparabilité soit prise en compte. Il est donc important, afin d'éviter le risque de porter atteinte à l'efficacité de l'interdiction de discrimination indirecte, que les autorités et juridictions nationales soient particulièrement vigilantes sur la question de la comparabilité.

Une fois que la partie requérante est parvenue à démontrer des faits qui permettent de présumer l'existence d'une discrimination, **il incombe à la partie défenderesse de prouver qu'il n'y a pas eu violation du principe de l'égalité de traitement**. Celle-ci peut, dans ce contexte, tenter de réfuter la présomption de discrimination en infirmant le préjudice ou la relation causale entre le préjudice et le motif de discrimination. Si cette tentative échoue, la partie défenderesse peut essayer de présenter une justification à la discrimination présumée – justification qui doit reposer sur un but légitime et une mesure proportionnée. Ici également, étant donné la nature ouverte de la notion de justification objective dans la définition de la discrimination indirecte, la première voie s'avère plus aisée que la seconde.

16 CJUE, affaire C-83/14 CHEZ Razpredelenie Bulgaria AD contre Komisia za zashtita ot diskriminatsia (en présence de: Anelia Nikolova, Darzhavna Komisia za energiyno i vodno regulirane), 16 juillet 2015, ECLI:EU:C:2015:480 (grande chambre), points 101 et 107.

Dans la pratique, les juridictions nationales se heurtent à une difficulté particulière du fait que la jurisprudence de l'UE ne peut, dans le cadre d'une procédure préjudicielle en vertu de l'article 267 du TFUE, aller au-delà de la formulation d'indications à l'intention de la juridiction de renvoi quant aux points que celle-ci doit examiner dans le contexte d'une justification objective, laissant donc l'évaluation proprement dite aux soins des juridictions nationales – lesquelles feraient bien de prendre au sérieux le caractère restrictif des dérogations à l'interdiction de discrimination et de s'abstenir d'admettre trop aisément des justifications objectives.

Un problème particulier se pose lorsque la justification invoquée est liée à **un droit de l'auteur présumé qui entre en concurrence ou en conflit avec un droit de la victime de la discrimination alléguée**. La directive 2000/78 comporte certaines dispositions à cet égard. Premièrement, son article 2, paragraphe 5, stipule que la directive «ne porte pas atteinte aux mesures prévues par la législation nationale qui, dans une société démocratique, sont nécessaires à la sécurité publique, à la défense de l'ordre et à la prévention des infractions pénales, à la protection de la santé et *à la protection des droits et libertés d'autrui* (italiques ajoutés). Son article 4, paragraphe 2, vise ensuite les exigences professionnelles dans le cadre d'activités au sein d'églises et d'autres organisations publiques ou privées dont l'éthique est fondée sur la religion ou les convictions. La directive 2000/43 ne prévoit par contre aucune règle équivalente. Sans doute pourrait-on établir ici un parallèle avec la jurisprudence de la CJUE en matière de libre circulation, selon laquelle la protection des droits fondamentaux peut justifier des restrictions de la libre circulation.[17]

Les arrêts de la Cour dans les affaires relatives au port du foulard confirment que la question des droits interférents doit être analysée dans le contexte de la justification. Dans son arrêt *WABE et Müller*,[18] la Cour insiste sur la nécessité de concilier comme suit des droits concurrents:

> «[L]orsque plusieurs droits fondamentaux et principes consacrés par les traités sont en cause, tels que, en l'occurrence, le principe de non-discrimination consacré à l'article 21 de la Charte et le droit à la liberté de pensée, de conscience et de religion garanti à l'article 10 de la Charte, d'une part, ainsi que le droit des parents d'assurer l'éducation et l'enseignement de leurs enfants conformément à leurs convictions religieuses, philosophiques et pédagogiques reconnu à l'article 14, paragraphe 3, de la Charte et la liberté d'entreprise reconnue à l'article 16 de la Charte, d'autre part, l'appréciation du respect du principe de proportionnalité doit s'effectuer dans le respect de la conciliation nécessaire des exigences liées à la protection des différents droits et principes en cause et d'un juste équilibre entre eux [...].»

L'approche de la Cour dans sa jurisprudence relative aux vêtements à connotation religieuse a été vivement critiquée dans des ouvrages académiques qui lui reprochent d'accorder trop de poids aux droits des employeurs. Il convient de noter toutefois que la Cour se montre désormais plus stricte pour ce qui concerne le test à appliquer – l'employeur devant démontrer une véritable nécessité à cet égard. Les juridictions doivent donc procéder à un examen particulièrement approfondi de la proportionnalité de la mesure restrictive lorsqu'elles sont saisies d'une affaire impliquant une concurrence entre différents droits.

Une dernière difficulté doit être évoquée, à savoir les **situations de discrimination multiple**. Le fait que des personnes possèdent des identités multiples a pour conséquence qu'un même cas de discrimination peut impliquer plusieurs motifs de discrimination à la fois. Cette situation est reconnue par les directives 2000/43 et 2000/78, dont les préambules font spécifiquement référence au fait que les femmes sont

17 Voir notamment CJUE, affaire C-438/05 *International Transport Workers' Federation et Finnish Seamen's Union contre Viking Line ABP et OÜ Viking Line Eesti*, 11 décembre 2007, ECLI:EU:C:2007:772 (grande chambre).

18 CJUE, affaires jointes C-804/18 et C-341/19 *IX contre WABE eV et MH Müller Handels GmbH contre MJ*, 15 juillet 2021, ECLI:EU:C:2021:594 (grande chambre), paragraphe 84. A l'heure de rédiger le présent rapport, une autre affaire est en cours devant la CJUE, à savoir l'affaire C-344/20 *LF contre SCRL*.

souvent victimes de discriminations multiples (considérant 14 et 3 respectivement). L'importance de la discrimination multiple a également été reconnue par la Commission européenne.[19]

La difficulté pourrait naître ici du fait que la discrimination multiple peut susciter des problématiques complexes liées, entre autres, à la liste exhaustive des motifs de discrimination et aux disparités entre champs d'application ainsi qu'entre moyens de défense et dérogations selon les différents instruments du droit de l'UE. La CJUE a considéré en outre que seules certaines situations sont couvertes par le droit de l'Union. Si la discrimination peut effectivement se fonder, selon elle, sur plusieurs motifs protégés en vertu du droit européen, celui-ci ne constitue pas pour autant un fondement pour la reconnaissance de la discrimination intersectionnelle; en réalité, «il n'existe, toutefois, aucune nouvelle catégorie de discrimination résultant de la combinaison de plusieurs de ces motifs tels que l'orientation sexuelle et l'âge, dont la constatation puisse être effectuée, lorsque la discrimination en raison desdits motifs, isolément considérés, n'a pas été établie».[20] Autrement dit, la Cour exclut la discrimination intersectionnelle de la portée des directives 2000/43 et 2000/78. De surcroît, l'approche de la Cour dans le cadre de cas réels de discrimination multiple ne s'est pas avérée particulièrement utile à ce jour.

Il est important de noter que l'attitude rigide de la Cour vis-à-vis de la discrimination intersectionnelle *n'oblige pas* les États membres à suivre la même approche. Ils sont libres d'assurer une protection significative à l'encontre de la discrimination intersectionnelle et, ce faisant, de s'inspirer d'une série d'approches intéressantes développées dans d'autres ordres juridiques, à la fois nationaux et internationaux, ainsi que dans la littérature académique. Le présent rapport en fournit plusieurs exemples, y compris l'analyse d'un cas particulièrement utile en France à propos de la législation nationale et de la jurisprudence (voir la partie E).

La partie du rapport consacrée à la législation nationale et la jurisprudence commence par une comparaison entre les législations nationales des États membres pour ce qui concerne les définitions de la discrimination indirecte (certaines d'entre elles différant de la définition énoncée dans les directives 2000/43 et 2000/78), les motifs de discrimination couverts (souvent plus nombreux que ceux inclus dans les deux directives) et le champ matériel de la loi (souvent plus large que celui des directives et en particulier de la directive 2000/78). Cette partie du rapport s'intéresse en outre aux problèmes et aux bonnes pratiques qui ressortent de la jurisprudence nationale, comme déjà indiqué.

Le rapport conclut qu'en dépit de son très grand potentiel, le concept de discrimination indirecte reste apparemment trop souvent incompris et insuffisamment appliqué dans les États membres de l'Union européenne. D'une part, les États membres sont liés par le droit de l'Union. Ils sont notamment tenus d'adhérer à la jurisprudence de la Cour relative à la pertinence du concept de discrimination directe plutôt qu'indirecte, et d'assurer ainsi un niveau plus élevé de protection lorsque les faits d'un cas d'espèce le réclament. D'autre part, les États membres devraient tirer parti de la liberté que leur laisse le droit de l'Union de renforcer l'interdiction de discrimination, que ce soit en adoptant des règles plus favorables concernant les matières relevant des directives ou en assurant une protection supplémentaire dans des domaines que celles-ci ne couvrent pas.

19 Commission européenne (2007) *Lutte contre la discrimination multiple: pratiques, politiques et lois*, Luxembourg: Office des publications officielles des Communautés européennes, p. 5; et Rapport de la Commission au Parlement européen et au Conseil sur l'application de la directive 2000/43/CE du Conseil relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de race ou d'origine ethnique (directive sur l'égalité raciale) et de la directive 2000/78/CE du Conseil portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail (directive sur l'égalité en matière d'emploi), COM(2021) 139 final, p. 5 et suivante.

20 CJUE, affaire C-443/15 *David L. Parris contre Trinity College Dublin, Higher Education Authority, Department of Public Expenditure and Reform, Department of Education and Skills,* 24 novembre 2016, ECLI:EU:C:2016:897, point 80.

Zusammenfassung

Was ist mittelbare Diskriminierung? Der Begriff bezeichnet Maßnahmen, die in Bezug auf einen gesetzlich unzulässigen Diskriminierungsgrund neutral und somit scheinbar unproblematisch sind, die aber aufgrund der Situationen der Menschen, für die sie gelten, dennoch nachteilige Auswirkungen auf Personen haben, die durch einen solchen Grund geschützt werden, und die nicht gerechtfertigt werden können. Anders ausgedrückt: Solche Maßnahmen scheinen auf einer abstrakten Ebene akzeptabel zu sein, sind aber aufgrund ihrer unterschiedlichen Auswirkungen auf einer konkreten Ebene problematisch.

Der mittelbare Charakter der Diskriminierung bezieht sich darauf, wie eine bestimmte Behandlung mit einem bestimmten Diskriminierungsgrund zusammenhängt. Mittelbare Diskriminierung hängt inhaltlich (nicht formal) mit einem unzulässigen Diskriminierungsgrund zusammen. Sie ist nicht ohne weiteres zu erkennen, sondern eher implizit. Der mittelbare Charakter der Diskriminierung bedeutet jedoch nicht, dass Personen, die von ihr betroffen sind, in irgendeiner Weise weniger betroffen sind. Tatsächlich leidet eine Person, die von mittelbarer Diskriminierung betroffen ist, genauso sehr wie eine von unmittelbarer Diskriminierung betroffene Person. In beiden Fällen werden Rechte und Chancen beeinträchtigt, und in beiden Fällen kann die Diskriminierung negative Auswirkungen auf den sozialen und wirtschaftlichen Status, das Wohlbefinden und die Gesundheit haben. Im spezifischen Kontext des Unionsrechts hat der Gerichtshof der Europäischen Union (EuGH) festgestellt, dass Diskriminierungen generell „die Verwirklichung der im AEUV [Vertrag über die Arbeitsweise der Europäischen Union] festgelegten Ziele unterminieren können, insbesondere die Erreichung eines hohen Beschäftigungsniveaus und eines hohen Maßes an sozialem Schutz, die Hebung des Lebensstandards und der Lebensqualität, den wirtschaftlichen und sozialen Zusammenhalt, die Solidarität sowie das Ziel der Weiterentwicklung der Europäischen Union zu einem Raum der Freiheit, der Sicherheit und des Rechts“.[1]

Die Erfahrung hat leider gezeigt, dass der Begriff der mittelbaren Diskriminierung häufig nicht verstanden und manchmal nicht einmal akzeptiert oder anerkannt wird. Außerdem ist seine Anwendung in der Praxis mit einer Reihe von Herausforderungen verbunden. In einer kürzlichen Evaluierung der Umsetzung der Richtlinien 2000/43[2] und 2000/78[3] in den EU-Mitgliedstaaten stellte die Europäische Kommission fest, dass in der nationalen Rechtsprechungspraxis das Bewusstsein für mittelbare Diskriminierung beschränkt ist und das Konzept nur in eingeschränktem Maße Anwendung findet.[4]

Der vorliegende Bericht, der die Aktualisierung eines früheren Berichts (*Grenzen und Potenzial des Konzepts der mittelbaren Diskriminierung*) ist, der 2008 für das damalige Europäische Netzwerk von Rechtsexpertinnen und Rechtsexperten auf dem Gebiet der Nichtdiskriminierung erstellt wurde, bestätigt diese Feststellung.[5] Bei der Aktualisierung des Vorgängerberichts wurden sowohl Entwicklungen in der Rechtsprechung des EuGH zu den Richtlinien 2000/43 und 2000/78 als auch Entwicklungen in den internationalen Menschenrechtsnormen und im nationalen Recht der EU-Mitgliedstaaten berücksichtigt.

1 EuGH, Verbundene Rechtssachen C-804/18 und C-341/19, *IX/WABE e.V. und MH Müller Handels GmbH/MJ*, 15. Juli 2021, ECLI:EU:C:2021:594 (Große Kammer), Randnr. 62.
2 Richtlinie 2000/43/EG des Rates vom 29. Juni 2000 zur Anwendung des Gleichbehandlungsgrundsatzes ohne Unterschied der Rasse oder der ethnischen Herkunft, ABl. 2000 L 180/22.
3 Richtlinie 2000/78/EG des Rates vom 27. November 2000 zur Festlegung eines allgemeinen Rahmens für die Verwirklichung der Gleichbehandlung in Beschäftigung und Beruf, ABl. 2000 L 303/16.
4 Bericht der Europäischen Kommission an das Europäische Parlament und den Rat über die Anwendung der Richtlinie 2000/43/EG des Rates zur Anwendung des Grundsatzes der Gleichbehandlung ohne Unterschied der Rasse oder der ethnischen Herkunft („Rassismusbekämpfungsrichtlinie“) und der Richtlinie 2000/78/EG des Rates zur Festlegung eines allgemeinen Rahmens für die Verwirklichung der Gleichbehandlung in Beschäftigung und Beruf („Gleichbehandlungsrahmenrichtlinie“), COM(2021) 139 final, S. 5.
5 Tobler, C. (2008), *Grenzen und Potenzial des Konzepts der mittelbaren Diskriminierung*, Europäisches Netzwerk von Rechtsexpertinnen und -experten auf dem Gebiet der Nichtdiskriminierung, Luxemburg: Amt für amtliche Veröffentlichungen der Europäischen Gemeinschaften.

Das Unionsrecht muss im Kontext und vor dem Hintergrund anderer internationaler Rechtsvorschriften gesehen werden. Der Bericht geht kurz auf drei spezielle **internationale Menschenrechtsinstrumente** der Vereinten Nationen ein: das Übereinkommen zur Beseitigung der Rassendiskriminierung (CERD), das Übereinkommen zur Beseitigung jeder Form von Diskriminierung der Frau (CEDAW) und das Übereinkommen über die Rechte von Menschen mit Behinderungen (CRPD; das CRPD ist im Zusammenhang mit dem Unionsrecht von besonderer Bedeutung, da die EU selbst Vertragspartei des Übereinkommens ist). Alle diese Übereinkommen verbieten nicht nur unmittelbare, sondern auch mittelbare Diskriminierung. Das Gleiche gilt für die Europäische Menschenrechtskonvention (EMRK) des Europarats, auch wenn hier die Entwicklung des Begriffs wesentlich langsamer und zögerlicher war als im Unionsrecht.

In den internationalen Menschenrechtsnormen wird anerkannt, dass die Ursachen von Diskriminierung häufig struktureller Art sind. Manche Übereinkommen gehen über diese Anerkennung hinaus und verpflichten die Vertragsstaaten ausdrücklich, eine transformative Gleichstellung anzustreben. Derartige Bestimmungen sind die logische Konsequenz des Verbots aller Formen von Diskriminierung, insbesondere auch der mittelbaren Diskriminierung. Wo es um strukturelle Probleme einer Gesellschaft geht, reicht es nicht aus, derartige Diskriminierungen zu verbieten und in Einzelfällen Wiedergutmachung zu leisten. Vielmehr ist es zwingend erforderlich, die grundlegenden Ursachen anzugehen und dies auf proaktive und umfassende Weise zu tun.

In der EU ist das Verbot mittelbarer Diskriminierung Teil **eines umfassenden und vielschichtigen Systems von Gleichstellungs- und Nichtdiskriminierungsvorschriften der Union**. Einerseits umfasst dieses System allgemeine Gleichheits- und Nichtdiskriminierungsgrundsätze –mittlerweile sind diese auch in der Grundrechtecharta der Europäischen Union (GRC) verankert –, die in allen Bereichen des Unionsrechts gelten. Andererseits beinhaltet es gesetzliche Gleichstellungs- und Nichtdiskriminierungsbestimmungen sowohl auf der Ebene anderer primärrechtlicher Instrumente als der Charta als auch auf der Ebene der sekundären Rechtsvorschriften der Union, die innerhalb ihres festgelegten (und in der Regel begrenzten) Anwendungsbereichs gelten.

Seit der Änderung des Lissabon-Vertrags, die am 1. Dezember 2009 in Kraft trat, hat die Grundrechtecharta denselben Rechtsstatus wie die Verträge. Sie bindet die Organe, Einrichtungen, Ämter und Agenturen der EU in all ihren Handlungen, und sie bindet die Mitgliedstaaten immer dann, wenn diese im Geltungsbereich des Unionsrechts agieren. Letzteres bedeutet, dass die Bestimmungen der Charta keinen eigenständigen Charakter haben, sondern nur im Zusammenhang mit dem übrigen Unionsrecht angewendet werden können. Dadurch wird auch das Potenzial eingeschränkt, das in der Tatsache liegt, dass die Nichtdiskriminierungsvorschrift in Artikel 21 GRC – ähnlich wie Artikel 14 EMRK und im Unterschied zu anderen unionsrechtlichen Vorschriften als der GRC – eine offene Liste von Diskriminierungsgründen („Diskriminierungen insbesondere wegen“) enthält.

Was die praktischen Auswirkungen der Charta für den Einzelnen bzw. die Einzelne betrifft, so können sich Letztere in Fällen, in denen ein Konflikt zwischen dem nationalen Recht der Mitgliedstaaten und dem Unionsrecht besteht und dieser Konflikt nicht durch eine EU-konforme Auslegung des nationalen Rechts vermieden werden kann, als letztes Mittel auf die Bestimmungen der Charta berufen. Voraussetzung dafür ist, dass die jeweilige Bestimmung für sich genommen genügt, um dem oder der Einzelnen Rechte zu verleihen, und dass sie nicht durch Bestimmungen des Unionsrechts oder des nationalen Rechts präzisiert werden muss. Dies ist insbesondere bei Artikel 21 GRC der Fall. Er kann in horizontalen Situationen (d. h. in Fällen, an denen Einzelpersonen sowohl als Klägerpartei als auch als beklagte Partei beteiligt sind) herangezogen werden, wird aber in vertikalen Situationen (d. h. in Fällen, an denen Einzelpersonen als Klägerpartei und der Staat als beklagte Partei beteiligt sind), die unmittelbar wirksame Bestimmungen von EU-Richtlinien betreffen, nicht benötigt, da in solchen Fällen die einschlägigen Bestimmungen der Richtlinien herangezogen werden können.

Die Richtlinien 2000/43 und 2000/78 sind Teil des Gleichstellungs- und Nichtdiskriminierungsrechts der EU. In ihren jeweiligen Bereichen bringen sie den allgemeinen Grundsatz der Gleichbehandlung

und Nichtdiskriminierung bzw. das entsprechende in der Charta festgeschriebene Grundrecht zum Ausdruck. Sie sind für die Mitgliedstaaten verbindlich, die dafür sorgen müssen, dass ihr nationales Recht mit diesen Richtlinien in Einklang steht. Die Richtlinien basieren auf einer geschlossenen Liste von Diskriminierungsgründen und können nicht durch Auslegung um weitere Gründe erweitert werden. In manchen Fällen ist der Begriff der mittelbaren Diskriminierung jedoch möglicherweise in der Lage, Kriterien für eine bestimmte Behandlung einem geschützten Merkmal zuzuordnen. Außerdem steht es den Mitgliedstaaten frei, im Rahmen ihres nationalen Rechts weitere Diskriminierungsgründe hinzuzufügen. Beispiele für einen breiteren Ansatz und ganz allgemein für nützliche Ansätze (d. h. bewährte Verfahren) in den Mitgliedstaaten, die als Leitfaden für die Anwendung des Begriffs der mittelbaren Diskriminierung dienen können, werden in Teil E des Berichts zum Thema Nationale Rechtsvorschriften und Rechtsprechung geht, vorgestellt.

Die **Funktion des Begriffs der mittelbaren Diskriminierung im Unionsrecht** ist eine zweifache: die Wirksamkeit des Diskriminierungsverbots zu verbessern und die zugrundeliegenden Ursachen von Diskriminierung, die häufig struktureller oder systemischer Natur sind, sichtbar zu machen und zu bekämpfen. Mittelbare Diskriminierung ist – neben unmittelbarer Diskriminierung, Anweisung zur Diskriminierung und Belästigung – eine von mehreren Arten bzw. Formen von Diskriminierung, die in den Richtlinien 2000/43 und 2000/78 aufgezählt werden.

Was die **Bedeutung des Begriffs der mittelbaren Diskriminierung** angeht, so ist sein charakteristischstes Element der Fokus auf den nachteiligen Auswirkungen einer Maßnahme anstatt auf deren Erscheinungsform (bzw. auf irgendeiner Absicht der diskriminierenden Person). Eine nachteilige Auswirkung im Sinne des Begriffs führt zur Feststellung des Anscheins einer Diskriminierung, d. h. zur Vermutung des Vorliegens einer mittelbaren Diskriminierung, die widerlegt werden kann. Die endgültige Feststellung einer Diskriminierung hängt vom Fehlen einer Rechtfertigung ab, sei es einer sachlichen im Sinne der Legaldefinition von mittelbarer Diskriminierung oder einer gesetzlichen (d. h. eines spezifischen, gesetzlich verankerten Rechtfertigungsgrundes).

Ausgangspunkt für die Feststellung einer mittelbaren Diskriminierung ist eine Maßnahme, deren Grundlage sich formal von einem unzulässigen Diskriminierungsgrund unterscheidet (die Rechtsprechung des EuGH hat jedoch insofern eine wichtige Drehung vollzogen, als die Verwendung eines formal unterschiedlichen Grundes die Feststellung einer unmittelbaren Diskriminierung nicht zwangsläufig ausschließt; siehe weiter unten). In Fällen, in denen es sich um eine wirklich „dem Anschein nach neutrale“ Maßnahme handelt, hängt es von den Umständen – sowohl den rechtlichen als auch den sachlichen – ab, ob die Anwendung der fraglichen Maßnahme den Verdacht einer mittelbaren Diskriminierung aufkommen lässt. Dies wird dann der Fall sein, wenn die Maßnahme – tatsächlich oder potenziell – auf die zu schützenden Personen im Vergleich zu anderen Personen relevante nachteilige Auswirkungen hat. In einem solchen Fall ist die betreffende Maßnahme nur „dem Anschein nach“ neutral.

Nach Artikel 2 Absatz 2 Buchstabe b der Richtlinie 2000/78 setzt der Begriff der mittelbaren Diskriminierung voraus, dass die betreffende Maßnahme Personen „mit einer *bestimmten* Religion oder Weltanschauung, einer *bestimmten* Behinderung, eines *bestimmten* Alters oder mit einer *bestimmten* sexuellen Ausrichtung“ (Hervorhebungen hinzugefügt) benachteiligt. Artikel 2 Absatz 2 Buchstabe b der Richtlinie 2000/43 bezieht sich auf „Personen, die einer Rasse oder ethnischen Gruppe angehören“. Für Verwirrung sorgt, dass die Rechtsprechung des EuGH in Bezug auf das Erfordernis einer „bestimmten“ Unterkategorie eines Diskriminierungsmerkmals je nach Diskriminierungsmerkmal unterschiedlich zu sein scheint. Bislang hat der Gerichtshof nur bei einigen Merkmalen („Rasse“ oder ethnische Gruppe sowie Religion) auf diesem Aspekt insistiert, der den Begriff der mittelbaren Diskriminierung offenkundig einschränkt. In den nationalen Rechtsvorschriften einiger Mitgliedstaaten wird das Wort „bestimmten“ manchmal weggelassen, was zu einem höheren Schutzniveau führen kann. Nach dem Unionsrecht ist dies möglich, da die beiden Richtlinien lediglich Mindestanforderungen enthalten.

Eine dem Anschein nach neutrale Maßnahme mit unterschiedlichen Auswirkungen stellt nur dann eine mittelbare Diskriminierung dar, wenn sie nicht sachlich gerechtfertigt ist oder nicht unter eine gesetzliche Ausnahmeregelung fällt. Sachliche Rechtfertigung bedeutet in erster Linie, dass eine Maßnahme, die zu einer dem Anschein nach mittelbaren Diskriminierung führt, ein rechtmäßiges Ziel verfolgt. Hierbei handelt es sich um eine offene Kategorie, die sich nicht auf eine geschlossene Liste von Gründen beschränkt, sprich: Es gibt potenziell eine Vielzahl von Gründen, die akzeptabel sein können. Die jüngste Rechtsprechung des Gerichtshofs unterstreicht jedoch, dass ein Ziel nur dann rechtmäßig sein kann, wenn ein echter Bedarf dafür besteht. Außerdem müssen die zur Erreichung des rechtmäßigen Ziels gewählten Mittel verhältnismäßig, d.h. angemessen und erforderlich sein. Eine Maßnahme ist angemessen, wenn sie geeignet ist, das betreffende Ziel zu erreichen. Dies kann insbesondere nur dann der Fall sein, wenn das Ziel tatsächlich in kohärenter und systematischer Weise verfolgt wird. Eine Maßnahme ist notwendig oder erforderlich, wenn eine andere Maßnahme mit weniger unterschiedlichen oder ohne unterschiedliche Auswirkungen den Zweck nicht erfüllen würde. Der Gerichtshof hat außerdem hervorgehoben, dass die gewählte Maßnahme auf das unbedingt Erforderliche beschränkt sein muss.

Generell zeigt die Rechtsprechung, dass der EuGH relativ leicht akzeptiert, dass ein bestimmtes Ziel als solches rechtmäßig ist, und dass eine wesentlich größere Herausforderung auf der nächsten Ebene liegt, auf der es darum geht, die Verhältnismäßigkeit der zur Erreichung dieses Ziels gewählten Maßnahme (d.h. der Angemessenheit und Erforderlichkeit der Maßnahme) zu beurteilen.

Mittelbare Diskriminierung sollte von anderen Rechtsbegriffen unterschieden werden, die im Zusammenhang mit den Richtlinien 2000/43 und 2000/78 relevant sind. Der Bericht erörtert das Verhältnis von mittelbarer Diskriminierung zu Diskriminierung durch Assoziierung (bezogen auf die durch Diskriminierung beeinträchtigte Person), positiven Maßnahmen (die in den Richtlinien als bloße Möglichkeit für die Mitgliedstaaten genannt werden), positiven Verpflichtungen (die in bestimmten Entscheidungen des EuGH erwähnt werden), angemessenen Vorkehrungen für Menschen mit Behinderungen (die in der Richtlinie 2000/78 vorgeschrieben sind und die Feststellung einer Diskriminierung verhindern können) und zu unmittelbarer Diskriminierung.

Die **Unterscheidung zwischen unmittelbarer und mittelbarer Diskriminierung, wie sie in der Rechtsprechung des Gerichtshofs entwickelt wurde,** ist besonders wichtig, aber auch herausfordernd. Die beiden Begriffe sind logische Gegenstücke. Sie voneinander zu unterscheiden, ist aus praktischen Gründen wichtig: Erstens gibt es in den meisten Fällen weniger Gründe für die Rechtfertigung einer unmittelbaren Diskriminierung als für die Rechtfertigung einer mittelbaren Diskriminierung, da nach dem Unionsrecht unmittelbare Diskriminierung nur aus Gründen gerechtfertigt werden kann, die im Gesetz verankert sind (gesetzliche Rechtfertigungsgründe), während für mittelbare Diskriminierung zusätzlich die Möglichkeit einer sachlichen Rechtfertigung besteht.

Generell ist im Fall einer unmittelbaren Diskriminierung der Zusammenhang mit dem Diskriminierungsgrund stark. Tatsächlich ist der Zusammenhang eindeutig, wenn sich die betreffende Maßnahme ausdrücklich auf den unzulässigen Grund stützt. Bei mittelbarer Diskriminierung ist der Zusammenhang mit dem Diskriminierungsgrund dagegen vergleichsweise schwächer, da zusätzliche Aspekte hinsichtlich der *Auswirkungen* der Maßnahme berücksichtigt werden müssen. Charakteristisch für mittelbare Diskriminierung ist, dass die benachteiligte Gruppe nicht ausschließlich, sondern nur überwiegend aus Personen besteht, die durch das betreffende Diskriminierungsmerkmal geschützt sind. Diese sind in der benachteiligten Gruppe also „nur" unverhältnismäßig stark vertreten.

Nach der gegenwärtigen Rechtsprechung des Gerichtshofs kann es sein, dass die Verwendung von Kriterien, die scheinbar neutral sind, im Zusammenhang mit unmittelbarer Diskriminierung dennoch geprüft werden muss. Zwei Rechtsprechungslinien sind zu erkennen. Die erste, wichtigere Linie konzentriert sich auf die Beschaffenheit eines formal neutralen Kriteriums, das untrennbar mit einem unzulässigen Diskriminierungsgrund verbunden ist: Wird ein solches Kriterium verwendet, so ist unmittelbare (und nicht mittelbare) Diskriminierung der richtige Analyserahmen. Inzwischen existieren mehrere Fälle,

die diese Sichtweise übernehmen. Eine zweite, zahlenmäßig weniger bedeutende Linie konzentriert sich auf die Gründe, warum eine bestimmte nachteilige Behandlung bestimmten Personen oder Personengruppen zuteilwird: Wenn nachgewiesen werden kann, dass diese Gründe mit einem unzulässigen Diskriminierungsgrund verbunden sind, ist der korrekte Analyserahmen ebenfalls unmittelbare (und nicht mittelbare) Diskriminierung.

Nach der Rechtsprechung des EuGH müssen **formal neutrale Kriterien, die jedoch „untrennbar" mit einem unzulässigen Diskriminierungsgrund verbunden sind**, im Rahmen von unmittelbarer Diskriminierung und nicht von mittelbarer Diskriminierung geprüft werden. In seinem Grundsatzurteil in der Rechtssache *Szpital Kliniczny*,[6] in der es um Diskriminierung wegen einer Behinderung ging, stellte der Gerichtshof das folgende Kriterium für unmittelbare Diskriminierung auf: „Wenn ein Arbeitgeber einen Arbeitnehmer in einer vergleichbaren Situation weniger günstig behandelt, als ein anderer seiner Arbeitnehmer behandelt wird, behandelt worden ist oder behandelt werden würde, und sich im Hinblick auf alle für den betreffenden Fall erheblichen Umstände erweist, dass diese ungünstige Behandlung wegen einer Behinderung des erstgenannten Arbeitnehmers erfolgt, da sie auf *einem untrennbar mit der Behinderung verbundenen Kriterium* beruht, verstößt diese Behandlung folglich gegen das in Art. 2 Abs. 2 Buchst. a der Richtlinie 2000/78 aufgestellte Verbot einer unmittelbaren Diskriminierung" (Hervorhebung hinzugefügt).

Daraus folgt, dass ein formal neutrales Kriterium, das aufgrund bestimmter zusätzlicher Umstände jedoch untrennbar mit einem unzulässigen Diskriminierungsgrund verbunden ist, als auf diesem „beruhend" anzusehen ist. Der für die Prüfung des Kriteriums maßgebliche Rahmen ist somit der der unmittelbaren Diskriminierung. Nur wenn dies nicht der Fall ist, verlagert sich die Prüfung auf mittelbare Diskriminierung, die sich, so der Gerichtshof, auf „andere Kriterien, die nicht mit dem geschützten Merkmal verbunden sind", bezieht:

> „Was [...] die Frage betrifft, ob eine Praxis wie die im Ausgangsverfahren in Rede stehende eine mittelbare Diskriminierung im Sinne von Art. 2 Abs. 2 Buchst. b der Richtlinie 2000/78 darstellt, ist der Rechtsprechung des Gerichtshofs zu entnehmen, dass sich eine solche Diskriminierung aus einer Maßnahme ergeben kann, die – trotz ihrer neutralen Formulierung, d. h. des Bezugs auf andere Kriterien, die nicht mit dem geschützten Merkmal verbunden sind, – zu einer besonderen Benachteiligung von Personen mit diesem Merkmal führt [...]."[7]

In dem Bericht werden auch die Vorgängerurteile des EuGH, die zu *Szpital Kliniczny* führten, ausführlich erörtert.

In einer zweiten, weniger hervorstechenden Rechtsprechungslinie stellte der Gerichtshof fest, dass eine Maßnahme eine unmittelbare Diskriminierung darstellt, wenn sich erweist, dass diese Maßnahme **aus Gründen eingeführt und/oder beibehalten wurde, die mit einem unzulässigen Diskriminierungsgrund zusammenhängen**.[8] Im weiteren Verlauf desselben Urteils stellt der Gerichtshof unmittelbare und mittelbare Diskriminierung wie folgt gegenüber:

> „...ist [...] darauf hinzuweisen, dass – wie sich aus der Antwort auf die zweite, die dritte und die vierte Frage ergibt – eine Maßnahme, die zu einer Ungleichbehandlung führt, eine „unmittelbare Diskriminierung" im Sinne von Art. 2 Abs. 2 Buchst. a der Richtlinie 2000/43 darstellt, wenn sie *aus Gründen eingeführt wurde, die mit der Rasse oder der ethnischen Herkunft zusammenhängen*. Demgegenüber ist für eine mittelbare Diskriminierung aus Gründen der Rasse oder der ethnischen

6 EuGH, Rechtssache C-16/19, *VL gegen Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, 26. Januar 2021, ECLI:EU:C:2021:64 (Große Kammer), Randnr. 48.

7 EuGH, Rechtssache C-16/19 *VL gegen Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, 26. Januar 2021, ECLI:EU:C:2021:64 (Große Kammer), Randnr. 55.

8 EuGH, Rechtssache C-83/14 *CHEZ Razpredelenie Bulgaria AD gegen Komisia za zashtita ot diskriminatsia (Dritte: Anelia Nikolova, Darzhavna Komisia za energiyno i vodno regulirane)*, 16. Juli 2015, ECLI:EU:C:2015:480 (Große Kammer), Randnr. 91.

> Herkunft nicht erforderlich, dass die fragliche Maßnahme auf derartigen Gründen beruht. Wie sich nämlich aus der in Rn. 94 des vorliegenden Urteils angeführten Rechtsprechung ergibt, fällt eine Maßnahme, auch wenn sie unter Rückgriff auf neutrale Kriterien formuliert ist, die nicht auf das geschützte Merkmal abstellen, bereits dann unter Art. 2 Abs. 2 Buchst. b der Richtlinie 2000/43, wenn sie *bewirkt*, dass die Personen, die dieses Merkmal aufweisen, in besonderer Weise benachteiligt werden."[9]

Im Folgenden wird der Versuch unternommen, die zunehmend komplexer werdende Rechtsprechung des Gerichtshofs zur Abgrenzung von unmittelbarer und mittelbarer Diskriminierung, die für die Richtlinien 2000/43 und 2000/78 relevant ist, zum Zeitpunkt der Erstellung des Berichts zusammenzufassen:

Unmittelbare Diskriminierung:

- Der Begriff der unmittelbaren Diskriminierung ist in jedem Fall dann zutreffend, wenn ein unzulässiger Diskriminierungsgrund *ausdrücklich verwendet* wird. Dies ist in der Tat das einfachste Kriterium, um den unmittelbaren Charakter der Diskriminierung zu bestimmen. In der modernen Rechtsprechung des Gerichtshofs geht es in den allermeisten Fällen von unmittelbarer Diskriminierung um Ungleichbehandlungen aufgrund des Alters.
- Der Begriff der unmittelbaren Diskriminierung ist ferner dann zutreffend, wenn nachgewiesen werden kann, dass ein Kriterium zwar formal neutral ist, jedoch *aus Gründen gewählt wurde, die mit einem unzulässigen Diskriminierungsgrund zusammenhängen* (*Nikolova*).
- Der Begriff der unmittelbaren Diskriminierung ist des Weiteren zutreffend, wenn das verwendete Kriterium *untrennbar* mit einer unzulässigen Diskriminierung verbunden ist (wie insbesondere in der Rechtssache *Szpital Kliniczny* bestätigt). Es scheint, dass der Gerichtshof in diesem Zusammenhang den Schwerpunkt auf die ausschließende Wirkung des betreffenden Kriteriums legt: Entweder gehören alle, die durch das Kriterium benachteiligt werden, derselben geschützten Gruppe an (*Nikoloudi,*[10] *Kleist,*[11] *Andersen,*[12] *Maruko,*[13] *Römer*)[14] oder diese Gruppe umfasst Personen, die insofern vollständig ausgeschlossen sind, als sie das betreffende Kriterium nicht erfüllen können (*Hay*).[15]

Mittelbare Diskriminierung:

- Bei allen anderen Kriterien, die formal, vordergründig oder auf den ersten Blick neutral sind, trifft der Begriff der mittelbaren Diskriminierung zu. In diesen Fällen sind sowohl die begünstigten als auch die benachteiligten Gruppen heterogen.

Ein weiterer Teil des Berichts behandelt verschiedene **Herausforderungen, die sich bei der praktischen Anwendung des Begriffs der mittelbaren Diskriminierung ergeben**. Wann immer der Rechtsbegriff der mittelbaren Diskriminierung in der Praxis angewandt wird, muss die Prüfung des jeweiligen Falles eine dreistufige Analyse umfassen, die sich auf 1) den Geltungsbereich des Gesetzes, 2) den Charakter der Maßnahme als eine dem Anschein nach mittelbare Diskriminierung und 3) die sachliche oder gesetzliche

9 EuGH, Rechtssache C-83/14 *CHEZ Razpredelenie Bulgaria AD gegen Komisia za zashtita ot diskriminatsia (Dritte: Anelia Nikolova, Darzhavna Komisia za energiyno i vodno regulirane)*, 16. Juli 2015, ECLI:EU:C:2015:480 (Große Kammer), Randnrn. 95 und 96.

10 EuGH, Rechtssache C-196/02, *Vasiliki Nikoloudi gegen Organismos Tilepikoinonion Ellados AE*, 10. März 2005, ECLI:EU:C:2005:141.

11 EuGH, Rechtssache C-356/09, *Pensionsversicherungsanstalt gegen Christine Kleist,* 18. November 2010, ECLI:EU:C:2010:703.

12 EuGH, Rechtssache C-499/08, *Ingeniørforeningen i Danmark, handelnd für Ole Andersen, gegen Region Syddanmark,* 12. Oktober 2010, ECLI:EU:C:2010:600 (Große Kammer).

13 EuGH, Rechtssache C-267/06, *Tadao Maruko gegen Versorgungsanstalt der deutschen Bühnen*, 1. April 2008, ECLI:EU:C:2008:179 (Große Kammer).

14 EuGH, Rechtssache C-147/08, *Jürgen Römer gegen Freie und Hansestadt Hamburg,* 10. Mai 2011, ECLI:EU:C:2011:286 (Große Kammer).

15 EuGH, Rechtssache C-267/12, *Frédéric Hay gegen Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, 12. Dezember 2013, ECLI:EU:C:2013:823.

Rechtfertigung bezieht. Im Kontext dieser Analyse müssen folgende Fragen gestellt und beantwortet werden:

1) Fällt der Rechtsstreit in den Geltungsbereich des in dem jeweiligen EU-Mitgliedstaat anzuwendenden Antidiskriminierungsrechts, sprich: nationalen Rechts vor dem Hintergrund des Unionsrechts?
2) Wenn ja, kann die von der angeblichen Diskriminierung betroffene Person nachweisen, dass dem Anschein nach eine mittelbare Diskriminierung aus einem bestimmten Grund vorliegt?
3) Wenn ja, kann die Täterperson nachweisen, dass es eine Rechtfertigung gibt, die der Feststellung einer mittelbaren Diskriminierung entgegensteht?

In praktischen Fällen wird die erste Herausforderung immer darin bestehen, **anwendbares Antidiskriminierungsrecht zu finden**. Ob eine bestehende Unionsregelung anwendbar ist oder nicht, hängt vom Geltungsbereich dieses Rechts ab. Die Richtlinien 2000/43 und 2000/78 enthalten spezifische Bestimmungen zum Geltungsbereich, mit positiven und negativen Elementen, die diesen definieren. Wenn nationale Gerichte über die Anwendbarkeit von Nichtdiskriminierungsrecht zu entscheiden haben, müssen sie diese Elemente berücksichtigen.

Verschiedene Aspekte des Geltungsbereichs sind zu unterscheiden: geografischer, zeitlicher, persönlicher und materieller Geltungsbereich. Von all diesen ist der geografische Geltungsbereich vielleicht derjenige, der die geringsten Schwierigkeiten aufwirft. Im Unterschied zum Binnenmarktrecht der Union ist kein grenzüberschreitendes Element erforderlich. Vielmehr sollen beide Richtlinien einfach innerhalb der verschiedenen Mitgliedstaaten gelten. Was den zeitlichen Geltungsbereich betrifft, so ist die Frist für die Umsetzung der Richtlinien 2000/43 und 2000/78 längst abgelaufen; beide Richtlinien sind in den Mitgliedstaaten somit uneingeschränkt gültig. Probleme können sich jedoch in Fällen ergeben, in denen es um Sachverhalte geht, die einen längeren Zeitraum betreffen. Der persönliche Geltungsbereich der Richtlinien 2000/43 und 2000/78 ist besonders weit gefasst. Wie in Artikel 3 festgelegt, gelten die Richtlinien für alle Personen in öffentlichen und privaten Bereichen, einschließlich öffentlicher Stellen.

Ernsthafte Probleme könnten sich jedoch aus dem beschränkten sachlichen Geltungsbereich insbesondere der Richtlinie 2000/78 ergeben, da diese Richtlinie Diskriminierung aus Gründen der Religion oder der Weltanschauung, einer Behinderung, des Alters oder der sexuellen Ausrichtung ausschließlich in Bezug auf Beschäftigung und Beruf verbietet. Die Richtlinie 2000/43 ist wesentlich weiter gefasst, aber dennoch beschränkt. Die Beschränkungen des Geltungsbereichs der Richtlinien 2000/43 und 2000/78 bedeuten, dass Fälle, in denen es um mutmaßliche Diskriminierung geht, möglicherweise nicht in den Geltungsbereich dieser Richtlinien fallen. Wie offenkundig die mutmaßliche Diskriminierung dann auch sein mag, in solchen Fällen liegt keine Diskriminierung im Sinne des Unionsrechts vor. Es steht den Mitgliedstaaten jedoch frei, Diskriminierungen aus den in den Richtlinien 2000/43 und 2000/78 genannten Gründen in Bereichen zu verbieten, die nicht von den Richtlinien abgedeckt werden. Hat das nationale Recht einen breiteren sachlichen Geltungsbereich als das Unionsrecht, kann eine von Diskriminierung betroffene Person möglicherweise auf dieser Ebene Rechtsschutz finden. Beispiele für solche weiter gefassten Rechtsvorschriften sind in Teil E des Berichts aufgeführt.

Was die Auslegung von Elementen betrifft, die den Geltungsbereich der Richtlinien 2000/43 und 2000/78 definieren, so gilt der allgemeine Ansatz des Unionsrechts, wonach Elemente, die ein Recht positiv definieren, weit auszulegen sind, wohingegen Elemente, die das Recht einschränken, eng auszulegen sind, auch für Elemente des Geltungsbereichs.

Sobald die Anwendbarkeit des Nichtdiskriminierungsrechts der Union nach seinem Geltungsbereich festgestellt wurde, ist die nächste Frage, **ob der betreffende Fall dem ersten Anschein nach eine unmittelbare oder mittelbare Diskriminierung beinhaltet**. Hier scheint die Rechtsprechung des Gerichtshofs zur gegenseitigen Abgrenzung der beiden Begriffe die nationalen Gerichte vor besondere Herausforderungen zu stellen, was zu einer verwirrenden Rechtsprechung auf nationaler Ebene geführt hat. Es ist jedoch wichtig, dass die nationalen Gerichte der vom EuGH vorgegebenen Linie folgen und

das höhere Schutzniveau gewähren, das mit dem Konzept der unmittelbaren Diskriminierung einhergeht, wenn dies aufgrund des Sachverhalts in einem bestimmten Fall angebracht ist.

Die **Beweislast für das Vorliegen des Anscheins einer mittelbaren Diskriminierung** liegt bei der beschwerdeführenden Partei. Diese muss „Tatsachen glaubhaft machen, die das Vorliegen einer [unmittelbaren oder] mittelbaren Diskriminierung vermuten lassen" (Art. 8 Abs. 1 Richtlinie 2000/43, Art. 10 Abs. 1 Richtlinie 2000/78). Dies bedeutet, dass bei der Ermittlung der für die Vermutung einer Diskriminierung relevanten Marker ein gewisser Bezug zu den wesentlichen Elementen von Diskriminierung – sprich: ein Schaden (eine weniger günstige Behandlung oder Benachteiligung) und ein Kausalzusammenhang zwischen diesem Schaden und dem geschützten Merkmal – bestehen muss. In dem Bericht werden einige Beispiele aus der Rechtsprechung des EuGH erörtert, bei denen diese Anforderungen ernsthafte Herausforderungen und in manchen Fällen unüberwindbare Schwierigkeiten darstellten.

Mittelbare Diskriminierung erfordert sodann, dass Maßnahmen Personen **„in besonderer Weise benachteiligen können"**, d. h. die nachteiligen Auswirkungen müssen einen gewissen Grad erreichen. Was dies bedeutet, wird in den Richtlinien nicht näher erläutert, und auch aus der Rechtsprechung des Gerichtshofs lässt sich kein genaues Maß ableiten. In der Rechtssache *Nikolova* stellte der Gerichtshof eher allgemein fest, dass eine mittelbare Diskriminierung „insbesondere dann vorliegen kann, wenn eine nationale Maßnahme zwar neutral formuliert ist, in ihrer Anwendung aber *wesentlich mehr* Inhaber der geschützten persönlichen Eigenschaft benachteiligt als Personen, die diese Eigenschaft nicht besitzen", und dass die in Rede stehende Praxis geeignet war, „Personen mit einer solchen ethnischen Herkunft in *erheblich größerem Maße* zu beeinträchtigen und daher Personen mit einer solchen ethnischen Herkunft […] in besonderer Weise zu benachteiligen"[16] (Hervorhebungen hinzugefügt). Im Gegensatz dazu hat der EuGH einen bestimmten Schweregrad der Auswirkungen auf eine Gruppe als Kriterium abgelehnt. Er verlangt Auswirkungen, die Personen mit einem geschützten Merkmal im Vergleich zu anderen Personen mit großer Wahrscheinlichkeit beeinträchtigen.

In der Praxis wird es oft nicht notwendig sein, ein genaues Maß an unterschiedlichen Auswirkungen zu ermitteln. Den Definitionen von mittelbarer Diskriminierung in den Richtlinien 2000/43 und 2000/78 zufolge reicht es aus, dass die betreffenden Maßnahmen „Personen […] in besonderer Weise benachteiligen *können*" (Hervorhebung hinzugefügt). Anders ausgedrückt: Eine mögliche nachteilige Auswirkung ist für diesen Zweck ausreichend. Je nach den Umständen kann der entsprechende Nachweis auf einfacheren Mitteln als auf statistischen Daten basieren, da das Gericht nach dem „gesunden Menschenverstand" entscheiden kann, indem es sich auf allgemeines Wissen, auf offensichtliche Tatsachen oder auf seine eigene Überzeugung bzw. Erfahrung stützt.

Die Bewertung der unterschiedlichen Auswirkungen muss folglich nicht unbedingt auf quantitativen Beweisen (Statistiken) basieren, sondern kann sich stattdessen auch auf qualitative Beweise stützen. Dies bedeutet jedoch nicht, dass statistische Beweise unwichtig sind. In den Präambeln der Richtlinien 2000/43 und 2000/78 heißt es ausdrücklich, dass die einzelstaatlichen Rechtsvorschriften oder Gepflogenheiten insbesondere vorsehen können, dass mittelbare Diskriminierung mit allen Mitteln, einschließlich statistischer Beweise, festzustellen ist. In diesem Zusammenhang ist zu beachten, dass jeder Unterschied in den Auswirkungen zwischen den Gruppen statistisch signifikant ist. Statistische Beweise zu erlangen, kann eine Reihe von Herausforderungen mit sich bringen. In Anbetracht dessen sollten die nationalen Gerichte, wo immer dies nach innerstaatlichem Recht möglich ist, das leichter zu erfüllende Prüfverfahren anwenden, ohne jedoch statistische Beweise auszuschließen, wenn diese den Personen, die mutmaßlich von Diskriminierung betroffenen sind, helfen können, das Vorliegen unterschiedlicher Auswirkungen nachzuweisen. Im Interesse der Wirksamkeit des Verbots der mittelbaren Diskriminierung wird den

16 EuGH, Rechtssache C-83/14 *CHEZ Razpredelenie Bulgaria AD gegen Komisia za zashtita ot diskriminatsia (Dritte: Anelia Nikolova, Darzhavna Komisia za energiyno i vodno regulirane)*, 16. Juli 2015, ECLI:EU:C:2015:480 (Große Kammer), Randnrn. 101 und 107.

Gesetzgebern der Mitgliedstaaten empfohlen, statistische Beweise nicht zwingend vorzuschreiben. In dem Teil des Berichts, der sich mit nationalen Rechtsvorschriften beschäftigt, wird die französische *Méthode Clerc* als Beispiel für ein gutes Verfahren in Bezug auf Statistiken angeführt: Sie ermöglicht die Erhebung von Daten unter Einhaltung der datenschutzrechtlichen Anforderungen.

Nach richtigem Verständnis ist es für die **Feststellung von mittelbarer Diskriminierung nicht erforderlich, dass die Situationen** derjenigen, die bessergestellt, und derjenigen, die benachteiligt werden, **vergleichbar sind**. Problematisch ist in diesem Zusammenhang jedoch, dass der EuGH es gelegentlich zulässt, Vergleichbarkeit zu berücksichtigen. Um zu vermeiden, dass die Wirksamkeit des Verbots von mittelbarer Diskriminierung untergraben wird, ist es wichtig, dass die nationalen Behörden und Gerichte in der Frage der Vergleichbarkeit besonders sorgfältig vorgehen.

Ist es der beschwerdeführenden Partei gelungen, Tatsachen darzulegen, die das Vorliegen einer mittelbaren Diskriminierung vermuten lassen, obliegt es **der beschwerten Partei zu beweisen, dass keine Verletzung des Gleichbehandlungsgrundsatzes vorliegt**. In diesem Zusammenhang kann die beschwerte Partei versuchen, die Vermutung einer Diskriminierung zu entkräften, indem sie den Schaden bzw. den Kausalzusammenhang zwischen dem Schaden und dem Diskriminierungsgrund widerlegt. Gelingt ihr dies nicht, kann sie versuchen, die mutmaßliche Diskriminierung zu rechtfertigen. Dafür sind ein rechtmäßiges Ziel und die Angemessenheit der Maßnahme erforderlich. Im Kontext der offenen Kategorie der sachlichen Rechtfertigung, die Teil der Definition von mittelbarer Diskriminierung ist, ist Ersteres wiederum einfacher nachzuweisen als Letzteres.

In der Praxis liegt eine besondere Herausforderung für die nationalen Gerichte darin, dass die Rechtsprechung des EuGH im Vorabentscheidungsverfahren nach Artikel 267 AEUV unter Umständen nicht über die Fragen hinausgeht, die das vorlegende Gericht im Zusammenhang mit der sachlichen Rechtfertigung zu prüfen hat, und die eigentliche Beurteilung dem nationalen Gericht überlässt. Die nationalen Gerichte tun gut daran, den restriktiven Charakter der Ausnahmen vom Diskriminierungsverbot ernst zu nehmen und sachliche Rechtfertigungen nicht allzu leicht zu akzeptieren.

Eine besondere Herausforderung ergibt sich, wenn sich die vorgebrachte Rechtfertigung auf **ein Recht der mutmaßlich diskriminierenden Person bezieht, das mit einem Recht der von der mutmaßlichen Diskriminierung betroffenen Person konkurriert bzw. kollidiert**. Die Richtlinie 2000/78 enthält Bestimmungen, die sich auf dieses Problem beziehen. Erstens heißt es in Artikel 2 Absatz 5, dass die Richtlinie „die im einzelstaatlichen Recht vorgesehenen Maßnahmen, die in einer demokratischen Gesellschaft für die Gewährleistung der öffentlichen Sicherheit, die Verteidigung der Ordnung und die Verhütung von Straftaten, zum Schutz der Gesundheit und *zum Schutz der Rechte und Freiheiten anderer* notwendig sind“, nicht berührt (Hervorhebung hinzugefügt). In Artikel 4 Absatz 2 geht es darüber hinaus um berufliche Anforderungen in Bezug auf Tätigkeiten innerhalb von Kirchen und anderen öffentlichen oder privaten Organisationen, deren Ethos auf religiösen Grundsätzen oder Weltanschauungen beruht. Im Gegensatz dazu enthält die Richtlinie 2000/43 keine derartigen Vorschriften. Hier lässt sich vielleicht eine Parallele zur Rechtsprechung des EuGH auf dem Gebiet der Freizügigkeit ziehen, wonach der Schutz der Grundrechte Einschränkungen der Freizügigkeit rechtfertigen kann.[17]

Die Entscheidungen des Gerichtshofs zum Tragen eines Kopftuchs bestätigen, dass die Frage kollidierender Rechte im Kontext der Rechtfertigung zu prüfen ist. In den Rechtssachen *WABE und Müller*[18] unterstreicht der Gerichtshof die Notwendigkeit, konkurrierende Rechte wie folgt abzuwägen:

17 Siehe z. B. EuGH, Rechtssache C-438/05, *International Transport Workers' Federation und Finnish Seamen's Union gegen Viking Line ABP und OÜ Viking Line Eesti*, 11. Dezember 2007, ECLI:EU:C:2007:772 (Große Kammer).

18 EuGH, Verbundene Rechtssachen C-804/18 und C-341/19, *IX gegen WABE e.V. und MH Müller Handels GmbH gegen MJ*, 15. Juli 2021, ECLI:EU:C:2021:594 (Große Kammer), Randnr. 84. Zum Zeitpunkt der Erstellung dieses Berichts ist ein weiterer Fall beim EuGH anhängig, namentlich die Rechtssache C344/20, *L.F. gegen SCRL*.

> „[…] dass dann, wenn mehrere in den Verträgen verankerte Grundrechte und Grundsätze in Rede stehen, wie beispielsweise im vorliegenden Fall zum einen der in Art. 21 der Charta verankerte Grundsatz der Nichtdiskriminierung und das in Art. 10 der Charta verankerte Recht auf Gedanken-, Gewissens- und Religionsfreiheit sowie zum anderen das in Art. 14 Abs. 3 der Charta anerkannte Recht der Eltern, die Erziehung und den Unterricht ihrer Kinder entsprechend ihren eigenen religiösen, weltanschaulichen und erzieherischen Überzeugungen sicherzustellen, und die in Art. 16 der Charta anerkannte unternehmerische Freiheit, bei der Beurteilung der Einhaltung des Grundsatzes der Verhältnismäßigkeit die mit dem Schutz der verschiedenen Rechte und Grundsätze verbundenen Anforderungen miteinander in Einklang gebracht werden und dass zwischen ihnen ein angemessenes Gleichgewicht besteht […].“

Der Ansatz des Gerichtshofs in seiner Rechtsprechung zu religiöser Bekleidung wurde in der Wissenschaft häufig dafür kritisiert, den Rechten der Arbeitgeber zu viel Gewicht beizumessen. Es ist jedoch zu beachten, dass der Gerichtshof strenger geworden ist, was die anzuwendenden Kriterien betrifft. Tatsächlich muss der Arbeitgeber diesbezüglich einen echten Bedarf nachweisen. Wenn nationale Gerichte in einem Fall zu entscheiden haben, in dem verschiedene Rechte miteinander konkurrieren, müssen sie die Verhältnismäßigkeit der einschränkenden Maßnahme daher besonders sorgfältig prüfen.

Eine letzte Herausforderung, die zu erwähnen ist, betrifft die **Situationen von Mehrfachdiskriminierung**. Die Tatsache, dass Menschen mehrere Identitäten haben, bedeutet, dass Diskriminierungsfälle mehrere Diskriminierungsgründe gleichzeitig betreffen können. Dies wird in den Richtlinien 2000/43 und 2000/78 anerkannt, wo in den Präambeln (speziell) auf die Tatsache hingewiesen wird, dass Frauen häufig Opfer von Mehrfachdiskriminierung sind (Erwägungsgründe 14 und 3 der Präambeln der Richtlinien 2000/43 bzw. 2000/78). Die Bedeutung von Mehrfachdiskriminierung ist auch von der Europäischen Kommission anerkannt worden.[19]

Mögliche Herausforderungen ergeben sich daraus, dass Mehrfachdiskriminierung komplexe Fragen aufwerfen kann, die unter anderem mit der erschöpfenden Liste von Diskriminierungsgründen, den unterschiedlichen Geltungsbereichen sowie den unterschiedlichen Einwendungen und Ausnahmen im Rahmen der verschiedenen Instrumente des Unionsrechts zusammenhängen. Darüber hinaus hat der EuGH festgestellt, dass nur bestimmte Situationen unter das Unionsrecht fallen. Dem Gerichtshof zufolge kann eine Diskriminierung zwar auf mehreren durch das Unionsrecht geschützten Gründe beruhen, das Unionsrecht bietet aber keine Grundlage für die Anerkennung von intersektioneller Diskriminierung; der Gerichtshof erklärte, dass es in der Tat „keine neue, aus der Kombination mehrerer dieser Gründe […] resultierende Diskriminierungskategorie gibt, die sich dann feststellen ließe, wenn eine Diskriminierung wegen dieser Gründe, einzeln betrachtet, nicht nachgewiesen ist“.[20] Mit anderen Worten: Der Gerichtshof schließt intersektionelle Diskriminierung vom Geltungsbereich der Richtlinien 2000/43 und 2000/78 aus. Bislang war außerdem der Ansatz des Gerichtshofs im Zusammenhang mit realen Fällen von Mehrfachdiskriminierung nicht besonders hilfreich.

Wichtig ist, dass die starre Haltung des Gerichtshofs gegenüber intersektioneller Diskriminierung die Mitgliedstaaten nicht dazu *verpflichtet*, diesem Ansatz zu folgen. Vielmehr steht es den Mitgliedstaaten frei, einen sinnvollen Schutz gegen intersektionelle Diskriminierung zu gewährleisten. Dabei können sie sich an einer Reihe interessanter Ansätze orientieren, die in anderen Rechtsordnungen, sowohl auf internationaler als auch auf nationaler Ebene, sowie in der Wissenschaft entwickelt wurden. Der Bericht

19 Europäische Kommission (2007), *Bekämpfung von Mehrfachdiskriminierung – Praktiken, Politikstrategien und Rechtsvorschriften*, Luxemburg: Amt für amtliche Veröffentlichungen der Europäischen Gemeinschaften, S. 5, und Bericht der Europäischen Kommission an das Europäische Parlament und den Rat über die Anwendung der Richtlinie 2000/43/EG zur Anwendung des Grundsatzes der Gleichbehandlung ohne Unterschied der Rasse oder der ethnischen Herkunft („Rassismusbekämpfungsrichtlinie“) und der Richtlinie 2000/78/EG des Rates zur Festlegung eines allgemeinen Rahmens für die Verwirklichung der Gleichbehandlung in Beschäftigung und Beruf („Gleichbehandlungsrahmenrichtlinie“), COM(2021) 139 final, S. 5 ff.

20 EuGH, Rechtssache C-443/15, *David L. Parris gegen Trinity College Dublin, Higher Education Authority, Department of Public Expenditure and Reform, Department of Education and Skills,* 24. November 2016, ECLI:EU:C:2016:897, Randnr. 80.

enthält verschiedene Beispiele, darunter einen aufschlussreichen Fall aus Frankreich, der in Teil E des Berichts zum Thema Nationale Rechtsvorschriften und Rechtsprechung erörtert wird.

Der **Teil des Berichts zu nationalen Rechtsvorschriften und Rechtsprechung** beginnt mit einem Vergleich der nationalen Rechtsvorschriften der Mitgliedstaaten hinsichtlich der Definitionen von mittelbarer Diskriminierung (von denen einige von der in den Richtlinien 2000/43 und 2000/78 enthaltenen Definition abweichen), der erfassten Diskriminierungsgründe (häufig mehr als die von den beiden Richtlinien erfassten) und des sachlichen Geltungsbereichs der Rechtsvorschriften (häufig weiter gefasst als in den Richtlinien und insbesondere weiter als in der Richtlinie 2000/78). Darüber hinaus befasst sich dieser Teil des Berichts mit Problemen und bewährten Verfahren, die sich, wie bereits erwähnt, in der nationalen Rechtsprechung widerspiegeln.

Der **Bericht kommt zu dem Schluss**, dass der Begriff der mittelbaren Diskriminierung zwar ein großes Potenzial birgt, in den Mitgliedstaaten der Europäischen Union aber offenbar häufig nicht ausreichend verstanden und angewandt wird. Einerseits sind die Mitgliedstaaten an das Unionsrecht gebunden. Insbesondere sind sie verpflichtet, sich an die Rechtsprechung des Gerichtshofs zur Erheblichkeit des Begriffs der unmittelbaren Diskriminierung anstelle des Begriffs der mittelbaren Diskriminierung zu halten und somit ein höheres Schutzniveau zu gewährleisten, wenn dies in Anbetracht des Sachverhalts in einem bestimmten Fall erforderlich ist. Andererseits sollten die Mitgliedstaaten den ihnen vom Unionsrecht eingeräumten Spielraum nutzen, um das Diskriminierungsverbot zu stärken, indem sie entweder günstigere Regelungen in von den Richtlinien bereits erfassten Bereichen erlassen oder zusätzlichen Schutz in Bereichen gewähren, die außerhalb der Richtlinien liegen.

Introduction

What is indirect discrimination? Put simply, the term denotes measures that appear to be neutral in relation to a legally prohibited discrimination ground and thus unproblematic on their face but that, due to the situations of the people to whom they apply, nevertheless have a detrimental effect on persons protected by such a ground, and that cannot be justified. In other words, such measures appear acceptable on an abstract level but are problematic on a concrete level due to their disparate effect. A classic example: a company grants its part-time workers less advantageous working conditions (such as less pay and limited access to the occupational social security system) than its full-time workers. In a situation, where, due to a traditional division of roles in society and notably within the family, part-time workers are predominantly women, this will raise the suspicion of indirect discrimination based on sex. Another example: a job advertisement states that the future holder of the post in question must possess a driving licence. This does not appear problematic at first sight. However, blind people cannot obtain a driving licence, which means that this requirement excludes them from the post. Such a requirement, therefore, disadvantages persons with this particular disability. In situations such as these, there will be indirect discrimination (in the above examples, based on sex and disability, respectively) unless there is a (statutory or objective) justification for the treatment in question, for example if the employer requiring a driving licence can show that the job cannot be done without it.

As these examples show, the indirect nature of the discrimination relates to how a given treatment is linked to a particular discrimination ground. Indirect discrimination is in substance (rather than in form) linked to a prohibited discrimination ground. Indirect discrimination is not readily obvious but rather implicit. However, the indirect nature of the discrimination does not mean that its victims are in any way less affected. Indeed, an individual victim of indirect discrimination suffers just as much as a victim of direct discrimination. In both cases, rights and opportunities are prejudiced, and in both cases, discrimination can have a negative impact on social and economic status, wellbeing and health.[1] In the specific context of EU law, the Court of Justice of the European Union (CJEU) has stated that discrimination in general 'may undermine the achievement of the objectives of the TFEU [Treaty on the Functioning of the European Union], in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity and the objective of developing the European Union as an area of freedom, security and justice'.[2]

Unfortunately, experience has shown that the concept of indirect discrimination is often not understood and sometimes not even accepted or acknowledged. Moreover, its application in practice presents a number of challenges. In a recent evaluation of the implementation of Directives 2000/43[3] and Directives 2000/78[4] – which are the subject-matter of the present report – in the EU Member States, the European Commission found a limited awareness and application of the concept of indirect discrimination in domestic judicial practice.[5]

1 From the moral perspective, see, e.g. Thomsen, F.K. (2015) 'Stealing Bread and Sleeping Beneath Bridges – Indirect Discrimination as Disadvantageous Equal Treatment', *Moral Philosophy and Politics*, 2(2), p. 326: 'I see no reason to believe that it should make a difference to the moral wrongness (or rightness) of the agent's actions whether they are best understood as direct or indirect discrimination.' Similarly, Moreau argues that, from the perspective of the harm suffered it does not matter whether this harm has been brought about actively or whether rather it was 'only' foreseen as a kind of side-effect of a given (in-)action or simply was allowed to occur; Moreau, S. (2018) 'Moral Seriousness of Indirect Discrimination', in: Collins, H., Khaitan, T. (eds), *Foundations of Indirect Discrimination Law*, Oxford: Hart Publishing, p. 131.

2 CJEU, Joined Cases C-804/18 and C-341/19 *IX v WABE eV and MH Müller Handels GmbH v MJ*, 15 July 2021, ECLI:EU:C:2021:594 (Grand Chamber), paragraph 62.

3 Council Directive 2000/43/EC of 29 June 2009 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180/22.

4 Council Directive 2000/78/EC of 27 November 2009 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16.

5 Report from the European Commission to the European Parliament and the Council on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('the Racial Equality Directive') and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, COM(2021) 139 final, p. 4.

This finding is confirmed by this report, which updates an earlier report, *Limits and potential of the concept of indirect discrimination*, written for the European network of legal experts in the non-discrimination field (as it was then called) and published in 2008.[6] Against the backdrop of international human rights law, the report examined the function of the concept indirect discrimination as well as the meaning of the prohibition of indirect discrimination under EU law, in particular Directives 2000/43 and Directives 2000/78. At the time of the writing of the earlier report, no decisions by the CJEU on cases involving indirect discrimination under Directives 2000/43 and 2000/78 existed yet. Whilst indirect discrimination had been argued in the important case of *Maruko*[7] in the context of alleged discrimination based on sexual orientation caused through reliance on a criterion linked to marriage, it was rejected by the Court as irrelevant for these purposes. Instead, the Court found direct discrimination. Since then, the CJEU has handed down a number of decisions on indirect discrimination in the context of the two directives, many of them Grand Chamber decisions, which indicates their particular weight. In addition, certain recent decisions address the delimitation of the concepts of direct and indirect discrimination in a clearer manner than did previous case law.

Against that background, this report aims to update the 2008 report, in particular in view of developments in the CJEU case law, but also in view of developments in international human rights law and in the national law of the EU Member States. With respect to the latter, the report relies on information provided by the national experts of the European network of legal experts in gender equality and non-discrimination, through their annual reports to the network as well as through country fiches and questionnaires that they filled in specifically for the purposes of the current report. These documents were a particularly valuable source of information for this report in relation to national law and practice on indirect discrimination. The same is true for two comparative tables, put together by Isabelle Chopin and Catharina Germaine of the Migration Policy Group based on the information provided by the national experts, on the definition of indirect discrimination and on legislation protecting against indirect discrimination, respectively. These tables can be found in the annex to this report.

With respect to CJEU case law, it is important to note that the Court's decisions on Directives 2000/43 and 2000/78 must not be seen in isolation. Rather, concepts such as direct and indirect discrimination appear in different areas of Union law. In the field of social law, this includes notably sex equality law, where the same legal definition of indirect discrimination applies as under Directives 2000/43 and 2000/78. As Mulder[8] rightly states in her recent report on indirect sex discrimination in employment, the developments in the field of sex discrimination are relevant for the entire application of the concept of indirect discrimination, irrespective of the protected ground.[9] Accordingly, her text, too, has been a valuable source for the present report. Note that the Mulder report includes an in-depth discussion of the theoretical foundations of the concept of indirect discrimination[10] – something that is not addressed in this report.

This report focuses on Directives 2000/43 and 2000/78. Accordingly, it will not discuss case law on indirect discrimination on one of the grounds listed in those directives but in the context of other EU legislation (e.g. discrimination on the ground of religion in the context of patients' rights in cross-border healthcare).[11] Similarly, this report does not go into the importance of the concept of indirect discrimination

6 Tobler, C. (2008) *Limits and potential of the concept of indirect discrimination*, European network of legal experts in the non-discrimination field, Luxembourg: Office for Official Publications of the European Communities.

7 CJEU, Case C-267/06 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*, 1 April 2008, ECLI:EU:C:2008:179 (Grand Chamber).

8 Mulder, J. (2021) *Indirect sex discrimination in employment. Theoretical analysis and reflections on the CJEU case law and national application of the concept of indirect sex discrimination*, European network of legal experts in gender equality and non-discrimination, Luxembourg: Publications Office of the European Union, p. 21.

9 For a critical account on the 'carry over' approach, see O'Cinneide, C. (2020) 'Uniformity or Variation: Should the CJEU 'Carry Over' its Gender Equality Approach to the Post-2000 Equality Grounds?', in: Giegerich, T. (ed) and Backes, C., Jungfleisch, J. (asst. eds), *The European Union as Protector and Promoter of Equality*, Cham: Springer, pp. 115-133.

10 O'Cinneide, C. (2020), as of p. 29. See also various contributions in Collins, H., Khaitan, T. (eds) (2018) *Foundations of Indirect Discrimination Law*, Oxford: Hart Publishing.

11 See on this issue CJEU, Case C-243/19 *A v Veselības ministrija,* 29 October 2020, ECLI:EU:C:2020:872, concerning indirect discrimination against a Jehova's witness.

in relation to algorithmic discrimination, as this has been elaborated by Gerards and Xenidis in a special thematic report.[12]

The report is divided into five parts: indirect discrimination under international human rights law (part A); indirect discrimination in the system of EU law (part B); the definition of indirect discrimination under Directives 2000/43 and 2000/78 and the relationship of this concept with other legal concepts under EU non-discrimination law (part C); challenges in the practical application (part D); and national legislation and case law (part E). Similar to the 2008 version, the report includes a number of charts that are intended to support the text.[13]

Like its predecessor, the report hopes to contribute to a greater awareness and a better understanding of the concept of indirect discrimination and to give practical guidance on how to use the potential of the concept in order to fight discrimination and its negative effects.

12 Gerards, J., Xenidis, R. (2020) *Algorithmic discrimination in Europe. Challenges and opportunities for gender equality and non-discrimination law. A special report*, European network of legal experts in gender equality and non-discrimination Luxembourg: Publications Office of the European Union, p. 70 and following. See also Zuiderveen Borgesius, F. (2018) *Discrimination, Artificial Intelligence and Algorithmic Decision-Making*, Strasbourg: Council of Europe, p. 32 and following.

13 These charts are based on the models, adapted or updated for present purposes where appropriate, which can be found in: Tobler, C., Beglinger, J. (2020) *Essential EU Law in Charts* (5th edition, post-Brexit), Budapest: HVG-ORAC.

A The broader context: Indirect discrimination under international human rights law

EU law is regional law and as such should be seen in the context, and against the background of, both global law and other, broader regional regimes. This section of the report sets out briefly the meaning of indirect discrimination under three specific international human rights legal instruments of the United Nations (UN), namely the Convention on the Elimination of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (CRPD) (chapter I). Thereafter, the discussion turns to the European Convention of Human Rights of the Council of Europe (ECHR; chapter II). Against this broader international law context, a final section briefly addresses the aim of transformative equality in relation to indirect discrimination (chapter III).

I INDIRECT DISCRIMINATION UNDER SPECIFIC UN CONVENTIONS

1 The Convention on the Elimination of Racial Discrimination (CERD)

The oldest of the three UN Conventions relevant to this discussion is the Convention on the Elimination of Racial Discrimination (CERD)[14] of 1965. Article 1 defines racial discrimination as 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose *or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life' (emphasis added). Given that indirect discrimination is an effects-based concept, it must be concluded that the above definition with its reference to the effect of a given measure includes a prohibition not only of direct but also of indirect discrimination. This is indeed confirmed by the Committee supervising the CERD, which describes indirect discrimination as relating to 'measures which are not discriminatory at face value but are discriminatory in fact and effect, that is, if they amount to indirect discrimination.'[15]

2 The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

A similar picture emerges from the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[16] of 1979. Article 1 defines discrimination against women as 'any distinction, exclusion, restriction or preference made on the basis of sex, which has the *effect* or purpose of impairing of nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field' (emphasis added). Again, the reference to the effect of a measure shows that indirect discrimination is included in this definition.[17]

Indeed, according to the Committee supervising the CEDAW,[18] indirect discrimination against women 'may occur when laws, policies and programmes are based on seemingly gender-neutral criteria which in their

14 United Nations International Convention on all forms of Racial Discrimination: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial.

15 CERD Committee, *L.R. et al. v Slovakia*; Communication No. 31/2003, U.N. Doc. CERD/C/66/D/31/2003 (2005), paragraph 10.4. See further Thornberry, P. (2016) *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary*, Oxford: Oxford University Press, p. 14.

16 See https://www.un.org/womenwatch/daw/cedaw/.

17 See Kleber, E. (2019) 'Article 1 CEDEF', in: Hertig Randall, H., Hottelier, M., Lempen, K. (eds) *CEDEF – La Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes et son Protocole facultatif*, Geneva: Schulthess éditions romandes, p. 35; Byrnes, A. (2012) 'Article 1', in: Freeman, M. A., Chinkin, C., Rudolf, B. (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women. A Commentary*, Oxford: Oxford University Press, pp. 62 and 65.

18 CEDAW Committee, General recommendation No. 25, on Article 4 paragraph 1, temporary special measures, p. 9, note 1. The text of the CEDAW Committee's general recommendations is available on the internet, at http://www.un.org/womenwatch/daw/cedaw/recommendations/.

actual effect have a detrimental impact on women.' In its further explanation, the Committee points to the often-structural causes of indirect discrimination: 'Gender-neutral laws, policies and programmes unintentionally may perpetuate the consequences of past discrimination. They may be inadvertently modelled on male lifestyles and thus fail to take into account aspects of women's life experiences which may differ from those of men. These differences may exist because of stereotypical expectations, attitudes and behaviour directed towards women, which are based on the biological differences between women and men. They may also exist because of the generally existing subordination of women by men.'

3 The Convention on the Rights of Persons with Disabilities (CRPD)

Article 2 of the Convention on the Rights of Persons with Disabilities (CRPD)[19] of 2006 defines discrimination against persons with disabilities as 'any distinction, exclusion or restriction on the basis of disability which has the purpose *or effect* of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field' (emphasis added) and it specifies that this 'includes all forms of discrimination, including denial of reasonable accommodation'. Again, it must be concluded from the reference to the effect of a measure that indirect discrimination is included in the prohibition. According to the Committee supervising the CRPD,[20] indirect discrimination 'means that laws, policies or practices appear neutral at face value but have a disproportionate negative impact on a person with a disability. It occurs when an opportunity that appears accessible in reality excludes certain persons owing to the fact that their status does not allow them to benefit from the opportunity itself.'[21]

It should be added that the CRPD is particularly relevant in the context of EU law due to the fact that the EU itself is a party to the Convention.[22] The CJEU has outlined the consequences of this in its case law, including in the case of *Z.*:[23] where international agreements are concluded by the European Union, they are an integral part of the European Union legal order, they are binding on its institutions and, consequently, they prevail over (internal) acts of the European Union. In other words, there is primacy of the CRPD over Union secondary law such as Directive 2000/78. As a consequence, Union instruments of secondary law must as far as possible be interpreted in a manner that is consistent with the Convention. In addition, the validity of EU secondary law may be affected by the fact that it is incompatible with rules of international law.

II INDIRECT DISCRIMINATION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (ECHR)

Neier[24] has called the prohibition of indirect discrimination a 'common European legal principle' in a broad sense, including in the European Convention on Human Rights and Fundamental Freedoms (ECHR) of 1950. For EU law, the ECHR is of particular importance due to Article 6(3) of the Treaty on European Union (TEU). According to this provision, fundamental rights as guaranteed in the ECHR constitute general principles of the Union's law and are, therefore, part of the constitutional set-up of the Union.

19 UN Convention on the Rights of Persons with Disabilities (CRPD) https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html.

20 CEDAW Committee (2018) General comment No. 6 on equality and non-discrimination, paragraph 18.

21 See further, e.g. Bantekas, I., Stein M. A., Anastasiou, D. (2018) *The UN Convention on the Rights of Persons with Disabilities: A Commentary*, Oxford: Oxford University Press, p. 112 and following, and Cera, R. (2017) 'Article 2 [Definitions]', in: Della Fina, V., Cera, R., Palmisano, G. (eds), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary*, Cham: Springer, p. 112.

22 See generally Waddington, L. (2019) 'The Influence of the CRPD on EU Anti-Discrimination Law', in: Belavusau, U., Henrard, K. (eds) (2019) *EU Anti-Discrimination Law Beyond Gender*, Oxford: Hart Publishing, p. 343 and following.

23 CJEU, Case C-363/12 *Z. v A Government department, The Board of management of a community school,* 18 March 2014, ECLI:EU:C:2014:159 (Grand Chamber), as of paragraph 68.

24 Neier, C. (2021) 'Das Verbot mittelbarer Diskriminierung als gemeineuropäisches Rechtsprinzip. Tour d'horizon zum EU- und EWR-Recht, zur EMRK sowie zum deutschen, schweizerischen und liechtensteinischen Recht', in: Hoch, H., Neier, C., Schiess, P. (eds), *100 Jahre Liechtensteinische Verfassung,* Liechtenstein Politische Schriften, Vol. 62, pp. 243-270.

As under EU law, discrimination under the ECHR can consist in the different treatment of persons in comparable situations as well as in the same treatment of persons in non-comparable situations (*Thlimmenos*).[25] However, in contrast to the specific UN human rights conventions mentioned above, the ECHR does not include a legal definition of the concept of discrimination but just a prohibition. Article 14 ECHR states:

> 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

As the text of this provision indicates, the right to non-discrimination exists only in the context of other rights enshrined in the Convention. In the words of the European Court of Human Rights (ECtHR), 'Article 14 has no independent existence, but plays an important role by complementing the other provisions of the Convention and its Protocols, since it protects individuals placed in similar situations from any discrimination in the enjoyment of the rights set forth in those other provisions'.[26] However, the application of Article 14 ECHR does not necessarily presuppose the *violation* of a substantive right under the Convention. For Article 14 ECHR to become applicable, it is enough that the facts of the case fall *within the ambit* of another substantive provision of the Convention or its Protocols (*Lárusson*).[27]

For those States that have ratified it, Protocol No. 12 to the ECHR grants an independent right to non-discrimination. According to Article 1 of the Protocol:

> 'The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.'

Both Article 14 ECHR and Article 1 of Protocol No. 12 provide an open-ended list of relevant discrimination criteria ('discrimination on any ground such as'), which means that grounds that are not explicitly listed can also be recognised as relevant (e.g. sexual orientation).[28] However, the legal concept of indirect discrimination is relevant even in this context because under the ECHR – in contrast to EU law – different levels of scrutiny apply in relation to different discrimination grounds. According to Gerards,[29] it is precisely because of this issue that the notion of indirect discrimination gained importance in the context of the ECHR.

Following the case law of the ECtHR, only differences in treatment – or failure to treat differently persons in relevantly different situations – that are devoid of 'an objective and reasonable justification' constitute discrimination.[30] Whilst the States Parties to the ECHR generally enjoy a certain margin of appreciation

25 ECtHR, *Thlimmenos v Greece*, 6 April 2000 (Application no. 34369/97). The author of this report agrees with Mark Bell, according to whom *Thlimmenos* is not a case about indirect discrimination but rather about the failure to treat differently persons in different situations; Bell, M. (2007) 'EU anti-racism policy: the leader of the pack?', in: Meenan, H. (ed) *Equality Law in an Enlarged European Union. Understanding the Article 13 Directives*, Cambridge: Cambridge University Press, p. 198. Bell reacted to Olivier De Schutter, who put *Thlimmenos* in the context of indirect discrimination; De Schutter, O. (2005) *The Prohibition of Discrimination under European Human Rights Law. Relevance for EU Racial and Employment Equality Directives*, Luxembourg: Office for Official Publications of the European Communities, pp. 16, 45 and 52. In more recent ECHR case law, *Thlimmenos* is put squarely in the context of different treatment of people whose situations are significantly different; see, e.g. *Lárusson v Iceland*, 31 May 2022 (Application no. 23077/19), paragraph 56.

26 ECtHR, *Oršuš and Others v Croatia,* 16 March 2010 (Application no. 15766/03), paragraph 144.

27 ECtHR, *Lárusson v Iceland*, 31 May 2022 (Application no. 23077/19).

28 See European Court of Human Rights (2021) *Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention. Prohibition of discrimination*, Strasbourg: Council of Europe, paragraph 156.

29 Gerards, J. (2020) 'Non-Discrimination, the European Court of Justice and the European Court of Human Rights: Who takes the Lead?', in: Giegerich, T. (ed) and Backes, C., Jungfleisch, J. (asst. eds), *The European Union as Protector and Promoter of Equality*, Cham: Springer, p. 141.

30 E.g. ECtHR, *De Trizio v Switzerland*, 2 February 2016 (Application no. 7186/09), paragraph 80. See generally on this issue European Court of Human Rights (2021) *Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention. Prohibition of discrimination*, paragraph 50.

in assessing whether and to what extent differences in otherwise similar situations justify differential treatment, the Court has been stricter in relation to certain discrimination grounds.[31] Thus, ECtHR has held that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin[32] or exclusively on sexual orientation[33] is capable of being objectively justified. In other cases, very weighty reasons must be put forward, for example in cases relating to sex,[34] nationality[35] and birth outside marriage.[36] This means that the States' room for action with respect to objective justification differs depending on the discrimination ground. In other words, 'not all grounds of discrimination are equally potent'.[37] Against that backdrop, it may be useful or even vital to be able to bring a case under a discrimination ground to which a high level of scrutiny applies, and the concept of indirect discrimination may be instrumental in this respect.

The ECtHR initially hesitated to explicitly recognise indirect discrimination as unlawful, even though references to an effects-based approach to discrimination could be found early on in its case law (e.g. the *Belgian Linquistic* case,[38] *Marckx v Belgium*,[39] *Hugh Jordan v UK*).[40] An explicit reference to indirect discrimination can be found in *Hoogendijk v The Netherlands,*[41] where the Court stated:

> '[W]here an applicant is able to show, on the basis of undisputed official statistics, the existence of a prima facie indication that a specific rule – although formulated in a neutral manner – in fact affects a clearly higher percentage of women than men, it is for the respondent Government to show that this is the result of objective factors unrelated to any discrimination based on sex. If the onus of demonstrating that a difference in impact for men and women is not in practice discriminatory does not shift to the respondent Government, it will be in practice extremely difficult to prove indirect discrimination.'

The *Hoogendijk* case concerned a disability allowance under Dutch law that was granted only if the earnings of the applicant or of a family member who was obliged to contribute to the applicant's maintenance remained below a certain level. The Court found indirect sex discrimination, based on the fact that the second condition (income of a family member) resulted in more women than men losing the benefit.

Indirect discrimination was also at the centre of *D.H. and others v Czech Republic* (also called the *Ostrava* case),[42] concerning racial discrimination to the prejudice of Roma children. Overruling a previous Chamber judgment, the Grand Chamber of the ECtHR reiterated that 'a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group'.[43] The Court added that 'a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group'.[44]

31 European Court of Human Rights (2021) *Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention. Prohibition of discrimination*, paragraph 73.
32 European Court of Human Rights (2021), paragraph 103.
33 European Court of Human Rights (2021), paragraph 139.
34 European Court of Human Rights (2021), paragraph 91.
35 European Court of Human Rights (2021), paragraph 128.
36 European Court of Human Rights (2021), paragraph 139.
37 Rainey, B., Wicks, E., Ovey, C. (2021) *Jacobs, White, and Ovey: The European Convention on Human Rights*, (8th edition), Oxford: Oxford University Press, p. 661.
38 ECtHR, *Case 'Relating to certain aspects of the laws on the use of languages in education in Belgium' v Belgium*, 23 July 1968 (Application nos. 1474/62, 1677/62, 1691/62, 1769/93, 1994/63, 2126/62).
39 ECtHR, *Marckx v Belgium*, 13 June 1979 (Application no. 6833/74).
40 ECtHR, *Hugh Jordan v UK*, 4 May 2001 (Application no. 24746/94).
41 ECtHR, *Hoogendijk v The Netherlands*, 6 January 2005 (Application no. 58641/00). According to Rainey, B., Wicks, E., Ovey, C. (2021), p. 659, this judgment established beyond doubt that indirect discrimination is indeed covered by Article 14 ECHR. On indirect discrimination under the ECHR, see also, e.g. Harris, D.J., O'Boyle, M., Bates, E., Buckley, C. (2018) *Harris, O'Boyle & Warbrick: law of the European Convention on Human Rights*, (4th edition), Oxford: Oxford University Press, p. 797 and following.
42 ECtHR, *D.H. and others v Czech Republic,* 13 November 2007 (Application number 57325/00).
43 ECtHR, *D.H. and others v Czech Republic,* 13 November 2007 (Application number 57325/00), paragraph 175.
44 ECtHR, *D.H. and others v Czech Republic,* 13 November 2007 (Application number 57325/00), paragraph 184.

The Grand Chamber also made express references to General policy recommendation No. 7 of the European Commission Against Racism and Intolerance (ECRI) of 13 December 2002 as well as to EU law (then EC law). It explained that 'a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group [...]. In accordance with, for instance, Council Directives 97/80/EC[45] and 2000/43/EC [...] and the definition provided by ECRI [...] such a situation may amount to "indirect discrimination", which does not necessarily require a discriminatory intent' ().

The ECRI Recommendation[46] contains definitions of both direct and indirect racial discrimination, which are modelled on EU law. According to the Recommendation, the term 'indirect racial discrimination' refers to

> 'cases where an apparently neutral factor such as a provision, criterion or practice cannot be as easily complied with by, or disadvantages, persons belonging to a group designated by a ground such as race, colour, language, religion, nationality or national or ethnic origin, unless this factor has an objective and reasonable justification. This latter would be the case if it pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised'.

In *D.H. and others v Czech Republic*, the Grand Chamber of the Court found indirect racial discrimination based on the fact that the percentage of Roma children placed in special schools in the Czech Republic was much higher than that of other children. The judgment has become a leading decision in the context of indirect discrimination under the ECHR. As noted by Havelková, subsequent ECtHR case law on indirect discrimination follows the same line, in spite of attempts by some Governments and even some ECtHR judges to undermine it.[47] For example, in *Biao v Denmark*[48] the Court held that 'a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group [...]. Such a situation may amount to "indirect discrimination", which does not necessarily require a discriminatory intent [...].' Furthermore, the Court confirmed in *Oršuš* that indirect discrimination may be proved without statistical evidence.[49]

It should be noted that – in contrast to EU law, where this is a particularly important point – the ECHR does not make a distinction between direct and indirect discrimination in terms of justification. Rather, as stated above, the Court distinguishes between different discrimination grounds in relation to the margin of appreciation that is left to the States. Also, Haverkort-Speekenbrink[50] found that the decisions of the ECtHR and the CJEU on whether a case should be assessed within the framework of direct or indirect discrimination are not always the same.

III INDIRECT DISCRIMINATION AND TRANSFORMATIVE EQUALITY

As Havelková[51] notes, discrimination is enabled by sociocultural and socioeconomic structures, which hierarchically organise society to the disadvantage of certain groups and their members. Accordingly, recognising discrimination depends on acknowledgments of social reality. This is particularly true for

45 Directive 97/80/EC on the burden of proof in cases of discrimination based on sex, OJ 1998 L 14/6 (no longer in force).
46 ECRI General recommendation No. 7 on national legislation to combat racism and racial discrimination, adopted on 13 December 2002. The recommendation has been revised in December 2017, see https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/recommendation-no.7.
47 Havelková, B. (2018) 'Judicial Scepticism of Discrimination at the ECtHR', in: Collins, H., Khaitan, T. (eds), *Foundations of Indirect Discrimination Law*, Oxford: Hart Publishing, p. 84 and following.
48 ECtHR, *Biao v Denmark*, 24 May 2016 (Application no. 38590/10), paragraph 103.
49 ECtHR, *Oršuš and Others v Croatia,* 16 March 2010 (Application no. 15766/03), paragraph 153.
50 Haverkort-Speekenbrink, S. (2012) *European Non-Discrimination Law. A comparison of EU Law and the ECHR in the Field of Non-Discrimination and Freedom of Religion in Public Employment with an Emphasis on the Islamic Headscarf Issue,* Cambridge/Antwerp/Portland: Intersentia, p. 198 and following.
51 Havelková, B. (2018) 'Judicial Scepticism of Discrimination at the ECtHR', p. 85. In the older literature, see notably Loenen, T. (1999) 'Indirect Discrimination: Oscillating Between Containment and Revolution', in: Loenen, T., Rodrigues, P.R. (eds), *Non-Discrimination Law: Comparative Perspectives,* The Hague: Kluwer Law International, p. 199.

indirect discrimination, which often exposes structural problems in a particular society (see also B.II.2 below).

International human rights law recognises that the causes of discrimination are often of a structural nature. Going beyond such recognition, some Conventions explicitly oblige the States Parties to pursue transformative equality. Thus, Article 7 CERD obliges the States Parties to the Convention 'to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups [...].'

Under Article 5(a) CEDAW the States Parties are obliged to take all appropriate measures 'to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women'.[52]

Similarly, under Article 8(1) CRPD, the States Parties to the Convention undertake to

> 'adopt immediate, effective and appropriate measures: a) To raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities; b) To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life; c) To promote awareness of the capabilities and contributions of persons with disabilities.'

Such provisions are nothing more than the logical consequence of the prohibition of all forms of discrimination including, in particular, indirect discrimination. Where structural problems in a particular society are at issue, it is not enough to prohibit such discrimination and to make amends in individual cases. Rather, it is imperative that the root causes are tackled and that this is done in a proactive and comprehensive manner.[53]

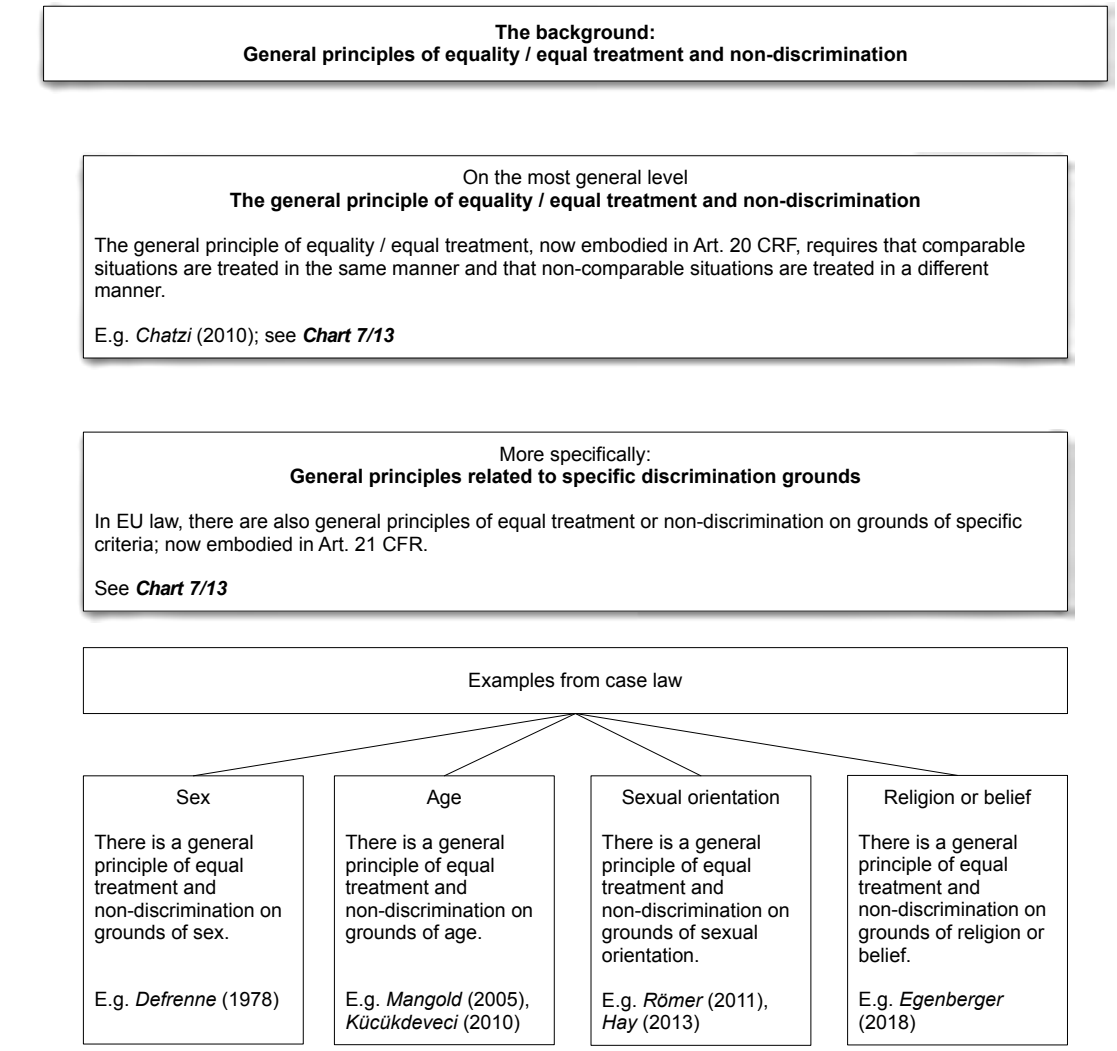
52 See Holtmaat, R. (2012) 'Article 5', in: Freeman, M. A., Chinkin, C., Rudolf, B. (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women. A Commentary*, Oxford: Oxford University Press, p. 143.

53 See, e.g. Suk, J.C. (2018) 'Anti-discrimination Law and the Duty to Integrate', in: Collins, H., Khaitan, T. (eds), *Foundations of Indirect Discrimination Law*, Oxford: Hart Publishing, p. 232 and following.

B Indirect discrimination in the system of EU law

I THE EU'S MULTI-LAYERED SYSTEM OF EQUALITY AND NON-DISCRIMINATION LAW

It is often noted in academic writing that equal treatment and non-discrimination are the very foundations of the EU legal order.[54] According to Muir,[55] EU equality law was also the very first fundamental rights policy of the EU. In this context, the prohibition of indirect discrimination is part of a broader system of EU equality or non-discrimination law that, over time, developed into a multi-layered system. On the one hand, that system comprises general equality or non-discrimination principles – now also embodied in the Union's Charter of Fundamental Rights (CFR) – that apply in all fields of Union law. On the other hand, it includes statutory equality and non-discrimination provisions both on the level of primary law other than the Charter and of secondary Union law that apply within their defined (and usually limited) fields of application.[56]



54 In the recent literature, see, e.g. Zaccaroni, G. (2021) *Equality and Non-discrimination in the EU. The Foundations of the EU Legal Order,* Cheltenham/Northampton: Edward Elgar, p. 78 and following.

55 Muir, E. (2018) *EU Equality Law. The First Fundamental Rights Policy of the EU,* Oxford: Oxford University Press, in particular as of p. 58.

56 On the development of this multi-layered system, see Tobler, C. (2013) 'The prohibition of discrimination in the Union's layered system of equality law: from early staff cases to the *Mangold* approach', in: Rosas, A., Levits, E., Bot, Y. (eds), *La cour de justice et la construction de l'Europe: Analyses et perspectives de 60 ans de jurisprudence/The Court of Justice and the construction of Europe: Analyses and perspectives on 60 years of case-law*, The Hague: Asser Press/Springer, pp. 443-467. More recently, see also Tobler, C. (2022) 'General principles of equal treatment in EU non-discrimination law', in: Ziegler, K.S., Neuvonen, P.J., Moreno-Lax, V. (eds), *Research Handbook on General Principles in EU Law. Constructing Legal Orders in Europe,* Cheltenham/Northampton: Edward Elgar, pp. 351-366.

Art. 157 TFEU and secondary non-discrimination legislation relating to these grounds are specific expressions of the general principles

E.g. *Egenberger* (2018), in relation to Directive 2000/78 and discrimination on grounds of religion; *Diritti LGBTI* (2020), in relation to Directive 2000/78 and sexual orientation.

Source: Christa Tobler, Jacques Beglinger (2020) *Essential EU Law in Charts*, ***Chart 10/14***.

1 General principles and Charter provisions on equality and non-discrimination

The construction of the multi-layered system of Union equality and non-discrimination law began in the 1970s with the recognition by the Court of Justice of a general principle of equality or equal treatment under what was then Community staff law (i.e. the Communities' internal employment law), followed by case law in the field of agricultural law.[57] According to this principle, 'comparable situations must not be treated differently and [...] different situations must not be treated in the same way unless such treatment is objectively justified'.[58] Muir calls this the 'meta-principle' or the 'standard formula' of equality.[59]

It is important to note that, on this most general level, the equality principle does not include any reference to discrimination grounds, which is why the author of this report has referred to it as the 'general principle of equality *tout court*',[60] as opposed to a number of further general equality principles which indeed focus on such grounds. Indeed, since the 1970s the Court of Justice has also recognised general equality or non-discrimination principles with a particular focus, beginning with sex – again first in staff cases and subsequently also in the context of Community employment law addressed to the Member States – and then moving on to other discrimination grounds, such as age and sexual orientation. With their particular foci, these general principles are specific expressions of the principle of equality *tout court.*

Under modern Union law, both types of general principles, i.e. the general principle of equality *tout court*, or the meta principle, as well as the various general principles of equality with a particular focus, are now enshrined in Articles 20, 21 and 23 of the Union's Charter of Fundamental Rights (CFR).[61]

According to Article 20 CFR:

> 'Everyone is equal before the law.'

Article 21 CFR provides:

> '1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. 2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination based on nationality shall be prohibited.'

57 Tobler, C. (2013) 'The prohibition of discrimination in the Union's layered system of equality law: from early staff cases to the *Mangold* approach', p. 447 and following.

58 For an example from recent case law, see CJEU, Case C-650/18 *Hungary v European Parliament*, 3 June 2021, ECLI:EU:C:2021:426 (Grand Chamber), paragraph 98, with further references.

59 Muir, E. (2019) 'The Essence of the Fundamental Right to Equal Treatment: Back to the Origins', *German Law Journal* 20, p. 818.

60 Tobler, C. (2013) 'The prohibition of discrimination in the Union's layered system of equality law: from early staff cases to the *Mangold* approach', p. 447 and following.

61 See, e.g. CJEU, Case C-555/07 *Seda Kücükdeveci v Swedex GmbH & Co. KG*., 19 January 2010, ECLI:EU:C:2010:21 (Grand Chamber), in relation to age; also Tobler, C. (2013) 'The prohibition of discrimination in the Union's layered system of equality law: from early staff cases to the *Mangold* approach', p. 454.

Article 23 CFR states:

> 'Equality between women and men must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.'

As Muir notes,[62] the function of these provisions in the Union legal system is that of traditional fundamental rights. Since the Lisbon treaty revision, which entered into force on 1 December 2009, the Charter has enjoyed the same legal status as the Treaties. It binds the EU institutions, bodies, offices and agencies in all their actions and it binds the Member States whenever they are acting within the scope of EU law.[63] Importantly, this latter condition means that the provisions of the Charter are not free-standing but can only be applied in the context of other Union law. This also limits the potential of the fact that, similar to Article 14 ECHR and in contrast to EU law other than the CFR, Article 21 CFR contains an open list of discrimination grounds ('any ground such as').

In terms of their practical effect for individuals, in cases where there is a conflict between the national law of the Member States and Union law and where this conflict cannot be avoided by interpreting the national law in conformity with EU law (more on this in the following section), Charter provisions may be relied on by individuals as a last resort. Under CJEU case law, the conditions for this are that a given provision is sufficient in itself to confer rights on individuals and that it does not need to be made more specific by provisions of EU or national law. This is notably the case for Article 21 CFR, as cited above.[64] It can be relied on in horizontal situations (i.e. in cases involving individuals both as applicants and as defendants) but is not needed in vertical situations (i.e. in cases involving individuals as applicants and the State as the defendant) that involve directly effective provisions of EU directives, since in such cases, the relevant provisions of the directives can be relied on.[65]

2 Specific provisions in statutory EU law

EU law (other than the CFR) encompasses a large number of substantive equality or non-discrimination provisions that can be found both in the TFEU and in EU secondary law, which includes Directives 2000/43 and 2000/78. For the discrimination grounds covered, these directives are of particular importance because the TFEU does not itself contain a provision that directly outlaws discrimination based on racial or ethnic origin, religion or belief, disability, age and sexual orientation (this is different for discrimination on the ground of nationality under Article 18 TFEU and further Treaty provisions for specific fields, and on the ground of sex in relation to pay under Article 157 TFEU). Instead, there is only a provision giving the Union the competence to act in the field of discrimination based on racial or ethnic origin, religion or belief, disability, age and sexual orientation, namely Article 19 TFEU.[66] Among other issues, this led to the adoption of Directives 2000/43 and 2000/78.

Directives 2000/43 and 2000/78 are part of the multi-layered system of Union equality and non-discrimination law mentioned above. In their respective fields, they give expression to the general principles/CFR rights of equality and non-discrimination.[67] They bind the Member States, which must

62 Muir, E. (2019) 'The Essence of the Fundamental Right to Equal Treatment: Back to the Origins', p. 821.
63 Article 51 CFR, as interpreted with respect to the Member States by the CJEU notably in Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, 7 May 2013, ECLI:EU:C:2013:105 (Grand Chamber).
64 See notably CJEU, Joined Cases C-335/11 and C-337/11 *HK Danmark, acting on behalf of Jette Ring, v Dansk almennyttigt Boligselskab (C-335/11), and HK Danmark, acting on behalf of Lone Skouboe Werge (C-337/11),* 11 April 2013, ECLI:EU:C:2013:222, and Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV*, ECLI:EU:C:2018:257 (Grand Chamber).
65 CJEU, Joined Cases C-569/16 and C-570/16 *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn*, 6 November 2018, ECLI:EU:C:2018:871 (Grand Chamber).
66 According to Muir, E. (2019) 'The Essence of the Fundamental Right to Equal Treatment: Back to the Origins', p. 822, the function of such Treaty provisions is at the same time that of a constitutional benchmark and of regulatory tools in that they define the scope and content of EU intervention in domestic policies.
67 Muir, E. (2019), p. 825 and following; Tobler, C. (2013) 'The prohibition of discrimination in the Union's layered system of equality law: from early staff cases to the *Mangold* approach', p. 454.

make sure that their national law is in line with Directives 2000/43 and 2000/78. Where EU legislation allows Member States a choice between various methods of implementation, the Member States must exercise their discretion in accordance with general principles of EU law, including the principle of equal treatment.[68] Further, wherever possible, national law must be interpreted in line with these Directives in order to avoid a conflict between national law and EU law. Under modern CJEU case law, the obligation of conform interpretation is particularly far-reaching.[69] Where a conflict of national law with Union law cannot be avoided through interpretation, individuals can rely on provisions of directives that give them rights, provided that these provisions are sufficiently precise and unconditional and provided further that the period for the implementation of the directive in question has expired. However, in the case of directives, this so-called direct effect exists only in vertical situations (cases involving individuals as applicants and the State as the defendant), to the exclusion of horizontal situations (cases involving individuals both as applicants and as defendants).[70] For the latter situation, Article 21 CFR is capable of filling the lacuna (see B.I.1 above).

In line with their legal basis, Directives 2000/43 and 2000/78 are based on a closed list of discrimination grounds that cannot be extended by adding further grounds through interpretation.[71] For example, under EU law, illness is not a prohibited discrimination ground, and illness is not the same as a disability, although an illness may lead to a disability.[72] Thus, in the *Kaltoft* case,[73] which concerned a person suffering from obesity, the Court stated that no provision of the TEU or TFEU prohibits discrimination based on obesity as such, nor does EU secondary legislation lay down a general principle of non-discrimination based on obesity as regards employment and occupation. However, obesity may lead to a disability within the meaning of Directive 2000/78. In the *Agafiței* case,[74] judges in Romania complained about harm they considered to have suffered as a result of disadvantageous treatment as regards remuneration to which they were subjected on account of the status accorded in this regard to certain types of prosecutors. The national court asked the CJEU about the interpretation of Directives 2000/43 and 2000/78. However, the CJEU found that these directives do not apply in such a case, since the alleged discrimination was not based on any of the grounds thus listed in the directives, but operated instead on the basis of the socioprofessional category to which the persons concerned belonged, or their place of work.

However, as will be seen in this report, in some cases the concept of indirect discrimination may be able to bring criteria for a given treatment under a prohibited criterion. Further, the Member States are free to add discrimination grounds as a matter of their national law.

3 Concepts of discrimination under EU social non-discrimination law

Directives 2000/43 and 2000/78 are part of the modern generation of social EU non-discrimination directives that explicitly list certain types or forms of discrimination, namely direct and indirect discrimination, instruction to discriminate and harassment, and which also provide specific legal definitions

68 CJEU, Case C-406/15 *Petya Milkova v Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen kontrol,* 9 March 2017, ECLI:EU:C:2017:198, paragraph 53, with further references.

69 See notably CJEU, Case C-573/17 *Daniel Adam Popławski*, 24 June 2019, ECLI:EU:C:2019:530 (Grand Chamber) and, in the field of non-discrimination, Case C-55/18 *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE,* 14 May 2019, ECLI:EU:C:2019:402 (Grand Chamber), and Case C-441/14 *Dansk Industri (DI), acting on behalf of Ajos A/S, v Estate of Karsten Eigil Rasmussen,* 19 April 2016, ECLI:EU:C:2016:278.

70 See, for example, Joined Cases C-569/16 and C-570/16 *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn*, 6 November 2018, ECLI:EU:C:2018:871, paragraph 76 and following.

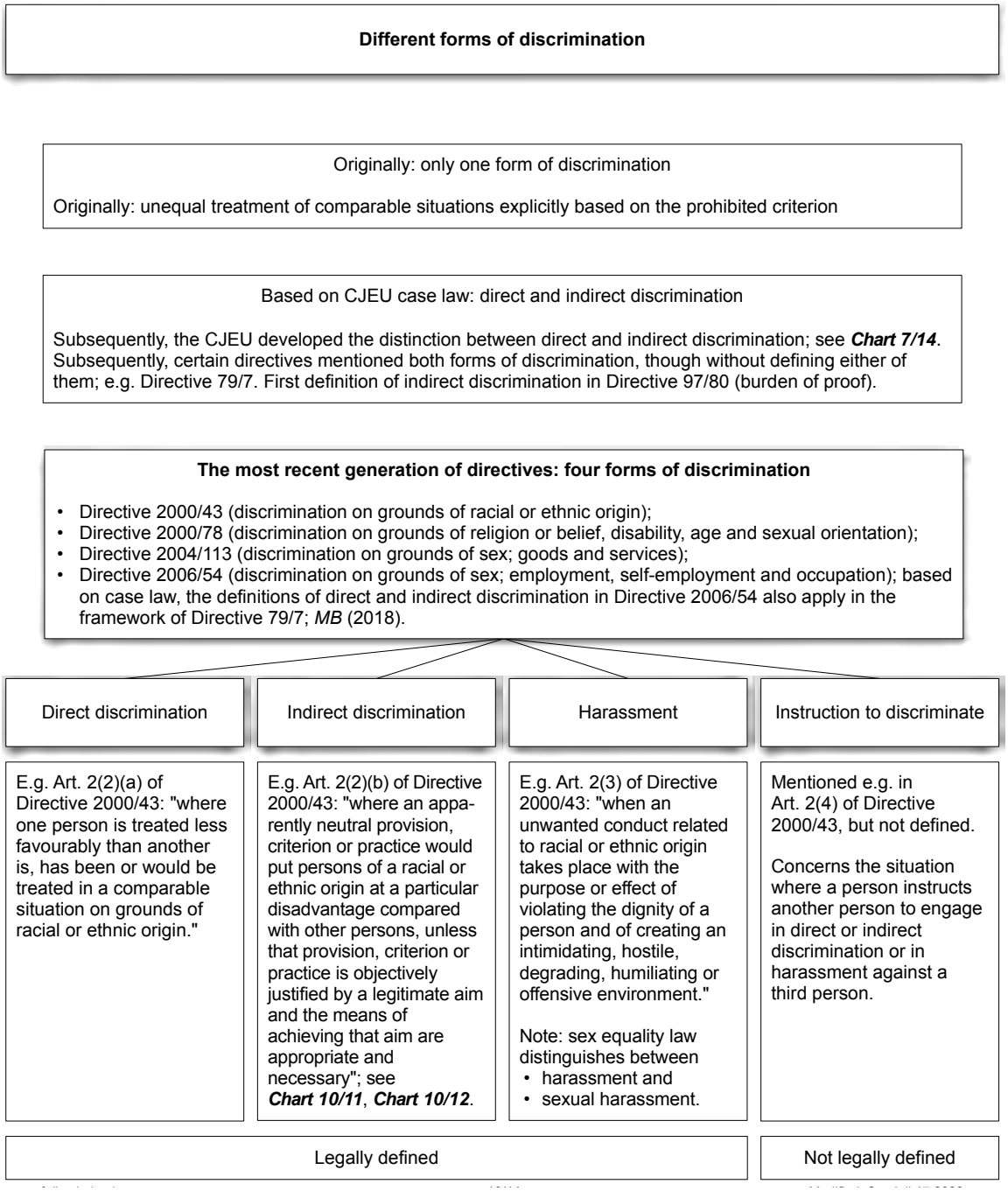
71 On the exhaustive nature of the list of grounds in Article 1 of Directive 2000/78, see CJEU, Case C-644/19, *FT v Universitatea 'Lucian Blaga' Sibiu, GS and Others, HS, Ministerul Educației Naționale*, 8 October 2020, ECLI:EU:C:2020:810, paragraph 31, with further references.

72 CJEU, Case C-13/05 *Sonia Chacón Navas v Eurest Colectividades SA*, 11 July 2006, ECLI:EU:C:2006:456, paragraph 39 and following.

73 CJEU, Case C-354/13, *Fag og Arbejde (FOA), acting on behalf of Karsten Kaltoft, v Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund,* 18 December 2014, ECLI:EU:C:2014:2463, in relation to obesity, as well as Hervey, T., Tobler, C. (2020) 'Non-ideal Weight Discrimination in EU Law', in: Giegerich, T. (ed) and Backes, C., Jungfleisch, J. (asst. eds), *The European Union as Protector and Promoter of Equality*, Cham: Springer, pp. 337-347.

74 Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation, COM(1999) 565 final.

for them, except for instruction to discriminate. In both directives, Article 2 contains a specific provision on the 'Concept of discrimination'.



Source: Christa Tobler, Jacques Beglinger (2020) *Essential EU Law in Charts*, ***Chart 10/10***.

Article 2(1) states that, for the purposes of the directives, 'the principle of equal treatment shall mean that there shall be no *direct or indirect discrimination*' based on the grounds covered by the directive (emphasis added). To use the example of the ground of racial or ethnic origin, Article 2(2) of Directive 2000/43 provides the following legal definitions:

'For the purposes of paragraph 1:
(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation based on racial or ethnic origin;
(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.'

In CJEU case law, there is also a more general definition of discrimination which is the counterpart of the general definition of equality under EU law discussed above. Thus, the CJEU has held in a consistent manner that 'discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations.'[75] In academic writing, it is sometimes said that direct discrimination is different treatment of persons in the same situation based on a prohibited ground, whilst indirect discrimination is about the same treatment of persons in different situations.[76] In fact, indirect discrimination cases can be seen as involving both same and different treatment. Consider the example from the introduction to this report in which a job advertisement states that the future holder of the post in question must possess a driving licence: it can either be seen as requiring the same of all people, namely the holding of a driving licence, or as treating differently those with and those without a driving licence.

Moreover, it is possible that a legal order that is based on a closed list of discrimination grounds at some point recognises indirectly different treatment as a ground for direct discrimination in its own right. In the context of EU law, the example of disadvantageous treatment of persons doing part-time work, also mentioned in the introduction, may serve to illustrate this fact: having been recognised by the Court as potentially leading to indirect sex discrimination in landmark cases such as *Jenkins*[77] and *Bilka*,[78] the EU legislature subsequently adopted secondary law that contains a direct prohibition of discrimination based on part-time work (though one with broad justification possibilities),[79] without taking away the possibility that the relevant treatment may also constitute indirect sex discrimination.

In practical terms it is not decisive whether one thinks about indirect discrimination in terms of a generally applicable requirement or of a criterion for different treatment. What matters instead is that the condition or criterion on the face of it applies irrespective of a recognised discrimination ground but in fact may lead to a particular disadvantage for persons protected by such a ground (in the example regarding the driving licence, blind people). In the general wording of the Court of Justice in the landmark *O'Flynn* case[80] and in the context of the prohibition of discrimination based on nationality and free movement for workers: '[U]nless objectively justified and proportionate to its aim, a provision [...] must be regarded as indirectly discriminatory if it is intrinsically able to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage.'

75 E.g. CJEU, Case C-283/15, *X v Staatssecretaris van Financiën,* 9 February 2017, ECLI:EU:C:2017:102, paragraph 29, with reference, among others, to the leading Case C-279/93 *Finanzamt Köln-Altstadt v Roland Schumacker*, 14 February 1995, EU:C:1995:31.

76 Put particularly clearly in the title of the following article from the field of philosophy: Thomsen, F.K. (2015) 'Stealing Bread and Sleeping Beneath Bridges – Indirect Discrimination as Disadvantageous Equal Treatment', *Moral Philosophy and Politics*, 2(2). In legal writing, see, e.g. FRA (European Union Agency for Fundamental Rights), Council of Europe (2018) *Handbook on European non-discrimination law*, Luxembourg: Publications Office of the European Union, p. 53; Mulder, J. (2021) *Indirect sex discrimination in employment*, p. 21; Fredman, S. (2016), 'The Reason Why: unravelling indirect discrimination', *Industrial Law Journal* 45/2, p. 231; Collins, H., Khaitan, T. (eds) (2018) 'Indirect Discrimination Law: Controversies and Critical Questions', in: Collins, H., Khaitan, T. (eds) (2018) *Foundations of Indirect Discrimination Law*, Oxford: Hart Publishing, p. 4.

77 CJEU, Case 96/80 *J.P. Jenkins v Kingsgate (Clothing Productions) Ltd.*, 31 March 1981, ECLI:EU:C:1981:80.

78 CJEU, Case 170/84 *Bilka-Kaufhaus GmbH v Karin Weber von Hartz*, 13 May 1986, ECLI:EU:C:1986:204.

79 According to Article 4 of Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, OJ 1998 L 14/9, 'part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds.'

80 CJEU, Case C-237/94 *John O'Flynn v Adjudication Officer*, 23 May 1996, ECLI:EU:C:1996:206, paragraph 20.

As noted above, in addition to direct and indirect discrimination Article 2 of Directives 2000/43 and 2000/78 mention two further forms of discrimination.

Article 2(3) states that *harassment* shall be deemed to be discrimination within the meaning of paragraph 1. It provides the following legal definition:

> 'Harassment shall be deemed to be discrimination within the meaning of paragraph 1, when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.'

This definition makes clear that here comparability (mentioned in the definition of direct discrimination) is not a precondition for a finding of discrimination.[81] Rather, harassment is a very specific type of discrimination that goes beyond the generally used approach. It is sometimes said to be a particular manifestation of direct discrimination,[82] although it also seems conceivable that it could take the form of indirect discrimination.

Article 2(4) specifies that an *instruction to discriminate* will also be deemed to be discrimination within the meaning of paragraph 1. The concept of 'instruction to discriminate' relates to the person who can be held responsible for the discrimination inflicted. Based on Article 2(4) of the two Directives, this includes not only the person who commits the immediate discriminatory act but also the person who gave instructions to carry out the act.[83]

It should be added that the CJEU through its case law has also recognised the concept of *discrimination by association*, which relates to the person harmed by the discrimination and entitled to complain about it. According to the relevant case law, such harm may relate not only to the person with a characteristic reflected in a particular discrimination ground (e.g. a person with a disability) but also to other persons associated with that first person (e.g. the carer of a person with a disability who, because of this association, suffers disadvantageous treatment (*Coleman*)). Discrimination by association can take the form of both direct or indirect discrimination.[84]

The delimitation between direct and indirect discrimination is of particular importance in practice and will be discussed in detail at a later point in this report (see C.VI.5 below).

II MORE SPECIFICALLY: THE PROHIBITION OF INDIRECT DISCRIMINATION

1 Origins of the concept in EU law

The concept of indirect discrimination is not an original invention of the European Union (or, previously, the European Communities). There were precursors both in early public international law and in certain

81 See on this issue also FRA (European Union Agency for Fundamental Rights), Council of Europe (2018), p. 66.

82 FRA (European Union Agency for Fundamental Rights), Council of Europe (2018), p. 64. The case of *Coleman* provides an example of harassment in the form of direct discrimination; CJEU, Case C-303/06 *S. Coleman v Attridge Law and Steve Law*, 17 July 2008, ECLI:EU:C:2008:415 (Grand Chamber).

83 The Directives do not provide any further information and there is to date no CJEU case law on this matter. According to the *Handbook on European non-discrimination law*, 'it ought not to be confined to merely dealing with instructions that are mandatory in nature, but should extend to catch situations where there is an expressed preference or an encouragement to treat individuals less favourably due to one of the protected grounds'; FRA (European Union Agency for Fundamental Rights), Council of Europe (2018) *Handbook on European non-discrimination law*, p. 67; in the same vein Ellis, E., Watson, P. (2012) *EU Anti-Discrimination Law*, (2nd edition), Oxford: Oxford University Press, p. 174.

84 FRA (European Union Agency for Fundamental Rights), Council of Europe (2018), p. 51. See on this issue in particular CJEU, Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia (third parties: Anelia Nikolova, Darzhavna Komisia za energiyno i vodno regulirane*), 16 July 2015, ECLI:EU:C:2015:480 (Grand Chamber).

national legal orders (USA, UK, Ireland),[85] which appear to have influenced European laws.[86] This caused Schiek[87] to call the concept of indirect discrimination a transplant from common law systems into the civil law systems of the European continent.

Of these precursors, a landmark case of American law is particularly illustrative. *Griggs v Duke Power Co.*,[88] decided by the US Supreme Court in 1971, concerned racial discrimination. The plaintiffs challenged the requirement of a high school diploma or the passing of intelligence tests as a condition for employment in, or transfer to, jobs at the Duke Power Company plant. Since these requirements were not directed at measuring the ability to learn to perform a job, they were found to be unlawful under the Civil Rights Act 1964 by the Supreme Court, even though the contested rule was formally neutral in terms of race. Writing for the Supreme Court, Chief Justice Burger explained that the legislature did not intend 'to provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox', but rather that 'the vessel in which the milk is proffered [should] be one all seekers can use. The Act proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation.'[89] In this passage, the reference to the stork and the fox refers to a fable by Aesop (who lived in the sixth century BC) about a fox that invites a crane to dinner and serves soup in a shallow dish, making it impossible for the guest to eat. When the crane invites the fox for dinner in return, the fox finds the food served in a tall jar with a narrow neck. In later versions of the fable the crane became a stork and thus an animal with an even longer beak. It captures well the meaning of indirect discrimination.

Turning to EU law, the terms 'direct discrimination' and 'indirect discrimination' did not appear in the original texts of the then European Communities. Rather, the distinction between these concepts was developed by the Court of Justice from the 1960s onwards through its interpretation of Treaty provisions, among them in particular the prohibition of discrimination based on nationality under what is today (after the renumbering of the Treaty provisions following the Lisbon treaty revision) Article 45 TFEU, on free movement for workers (*Ugliola*,[90] *Sotgiu*),[91] and the prohibition of discrimination based on sex under the then Communities' Staff Law (*Sabbatini*)[92] as well as under what is today Article 157(1) TFEU, on equal pay for men and women (*Jenkins*, *Bilka*).

In spite of their obvious importance, the terms 'direct discrimination' and 'indirect discrimination' to this day do not appear in the fundamental legal texts of the EU – the Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU) and the Charter of Fundamental Rights (CFR) – but appear only in secondary law, first in EU social law but today sometimes also in internal market law

85 See Tobler, C. (2005) *Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*, Antwerp/Oxford: Intersentia, p. 89 and following.
86 Tobler, C. (2005) *Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*, pp. 94 and 96.
87 Schiek, D. (2007) 'Indirect Discrimination', in: Schiek, D., Waddington, L., Bell, M. (eds) *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Oxford: Hart Publishing, p. 360.
88 US American Supreme Court, *Griggs v Duke Power Co.*, 401 U.S. 424 (1971), available at https://tile.loc.gov/storage-services/service/ll/usrep/usrep401/usrep401424/usrep401424.pdf.
89 US American Supreme Court, *Griggs v Duke Power Co.*, p. 431.
90 CJEU, Case 15-69 *Württembergische Milchverwertung-Südmilch AG v Salvatore Ugliola*, 15 October 1969, ECLI:EU:C:1969:46.
91 CJEU, Case 152-73 *Giovanni Maria Sotgiu v Deutsche Bundespost*, 12 February 1974, ECLI:EU:C:1974:13.
92 CJEU, Case 20-71 *Luisa Sabbatini, née Bertoni, v Parliament*, 7 June 1972, ECLI:EU:C:1972:48.

(e.g. the Services Directive[93] and the Geo-blocking Regulation).[94] In the area of EU sex equality law, where one older directive (Directive 79/7)[95] does not contain legal definitions, the Court relies on the definitions in more modern legislation (specifically in Directive 2006/54).[96] In other fields where there are no legal definitions of the concepts of direct and indirect discrimination, such as in EU economic law, the Court's case law-based definitions remain relevant, including notably the definition of indirect discrimination on the basis of nationality in the landmark decision in *O'Flynn*.

2 Functions of the concept in EU law

The function of the concept of indirect discrimination under EU law can be said to be twofold, namely, to enhance the effectiveness of the prohibition of discrimination and to make visible and challenge the underlying causes of discrimination, which are often structural or systemic in nature.

First, the concept of indirect discrimination provides an additional tool in detecting discrimination.[97] Indeed, the Court of Justice developed the concept through its case law with the aim of enhancing the effectiveness of the prohibition of discrimination. As the Court explained in an early landmark case on indirect discrimination based on nationality, the inclusion of indirect (or covert) discrimination 'is necessary to ensure the effective working of one of the fundamental principles of the Community', meaning in the specific context of this case, the free movement for workers and the prohibition of discrimination based on nationality.[98] In this context, the maxim that 'substance prevails over form' expresses the essence of the concept of indirect discrimination.[99]

In this context, the concept of indirect discrimination is of particular importance in legal systems such as EU law which – except for Article 21 CFR, which is, however, not a free-standing provision – are based on an exhaustive list of discrimination grounds. In such a system, where the list of relevant discrimination grounds is limited, the concept of indirect discrimination is an important tool for bringing a case involving a ground for differentiation that is not explicitly prohibited within the application field of EU law.[100] The concept is somewhat less important in legal contexts with open-ended non-discrimination provisions, such as international human rights conventions and the ECHR. Nevertheless, and as already noted (see

93 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ 2006 L 376/36, which in recital 65 of its preamble refers to 'indirect discrimination based on other grounds [meaning: other than nationality] but capable of producing the same result'.

94 Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, OJ 2018 L 60I/1. According to recital 6 of the preamble to this Regulation, indirect discrimination based on a customer's nationality or place of residence means 'unjustified differences of treatment on the basis of other distinguishing criteria which lead to the same result as the application of criteria directly based on customers' nationality or place of residence, regardless of whether the customer concerned is present, permanently or on a temporary basis, in another Member State, or place of establishment. Such other criteria can be applied, in particular, on the basis of information indicating the physical location of customers, such as the IP address used when accessing an online interface, the address submitted for the delivery of goods, the choice of language made or the Member State where the customer's payment instrument has been issued.'

95 Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ 1979 L 6/24.

96 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ 2006 L 204/23. – In the context of direct discrimination, see CJEU, Case C451/16 *MB v Secretary of State for Work and Pensions*, 26 June 2018, ECLI:EU:C:2018:492, paragraph 34. In the context of indirect discrimination, see CJEU, Case C-161/18 *Violeta Villar Láiz v Instituto Nacional de la Seguridad Social (INSS), Tesorería General de la Seguridad Social (TGSS),* 8 May 2019, ECLI:EU:C:2019:382, paragraph 37.

97 Fredman, S. (2018) 'Direct and Indirect Discrimination: Is There Still a Divide?', in: Collins, H., Khaitan, T. (eds), *Foundations of Indirect Discrimination Law*, Oxford: Hart Publishing, p. 51.

98 CJEU, Case 152-73 *Giovanni Maria Sotgiu v Deutsche Bundespost*, 12 February 1974, ECLI:EU:C:1974:13, paragraph 11.

99 Tobler, C. (2005) *Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*, p. 114.

100 Gerards, J. (2005) *Judicial Review in Equal Treatment Cases*, Leiden/Boston: Martinus Nijhoff, p. 13. Tobler, C. (2005) *Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*, p. 50.

A.II above), even here the concept has a role to play, in particular where there are different levels of scrutiny for different discrimination grounds.

Secondly, the concept of indirect discrimination can be seen as a tool to make visible and challenge the underlying causes of discrimination, which are often structural or systemic, i.e. prejudices, practices based on the idea of the inferiority or the superiority of particular groups of people and of stereotyped roles in society. For example, in the context of Directive 2000/78 and ethnic discrimination, the CJEU has emphasised the problems raised by prejudices and stereotypes against Roma people in its decision *Nikolova* (sometimes also referred to as *Chez*).[101]

It has been said that the concept of indirect discrimination helps to dismantle underlying power structures[102] as well as to identify areas where further action is needed in order to achieve true equality (see also A.III above, on transformative equality).[103] It is in view of this perspective that Mulder calls it a 'potent tool for recognising and remedying structural discrimination.'[104] At the same time, Fredman warns that the prohibition of indirect discrimination on its own can only further equality of opportunities in a shallow sense due to the possibility of justification, given that '[i]ndirectly discriminatory barriers need not be dismantled if they can be justified.'[105] Fredman concludes that the effectiveness of the concept of indirect discrimination in relation to real structural change is limited. In order to advance the transformational goal of equality, she advocates a high level of scrutiny for justification.[106]

101 CJEU, Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia (third parties: Anelia Nikolova, Darzhavna Komisia za energiyno i vodno regulirane)*, 16 July 2015, ECLI:EU:C:2015:480 (Grand Chamber).
102 Gijzen, M. (2006) *Selected Issues in Equal Treatment Law: A multi-layered comparison of European, English and Dutch law*, Antwerp/Oxford: Intersentia, p. 82.
103 Schiek, D. (2007) 'Indirect Discrimination', p. 327.
104 Mulder, J. (2021) *Indirect sex discrimination in employment*, p. 24.
105 Fredman, S. (2018) 'Direct and Indirect Discrimination: Is There Still a Divide?', p. 50.
106 Fredman, S. (2011), *Discrimination Law*, (2nd edition), Oxford: Oxford University Press, p. 182.

C Definition of indirect discrimination under Directives 2000/43 and 2000/78 and relationship with other concepts of Union law

The report now turns to the specific meaning of the concept of indirect discrimination under Directives 2000/43 and 2000/78. In this section, the elements that make up the definition of indirect discrimination are listed and explained and the relationship of the concept of indirect discrimination with other concepts of EU law are discussed. Particular challenges imposed by the practical application of the concept of indirect discrimination will be discussed in part D. The procedural context of CJEU case law on indirect discrimination is addressed briefly in a preliminary remark.

I PROCEDURAL CONTEXT OF CJEU CASE LAW

When discussing the definition of indirect discrimination under Directives 2000/43 and 2000/78 and its relationship with other concepts of Union law, CJEU case law plays a particularly important role. In order to understand both the function and the limits of the Court's decisions, the procedural framework in which they were rendered should be noted.

Most of the cases relevant for present purposes reached the CJEU through the preliminary ruling procedure (Article 267 TFEU), i.e. when a national court is faced with a case brought under national law that raises issues of EU law on which the national court is not certain. Further, the cases discussed below usually concern questions by the national court on the interpretation of provisions of Directives 2000/43 and 2000/78. In the preliminary ruling procedure, it is the Court's task to give that interpretation in the context of cases of that type before the national court, but in principle without ruling on that case, as that is the province of the national court. It is important to note that the interpretation given to Union law by the Court is binding on all Member States.

Whilst sometimes the Court makes rather explicit statements with respect to facts such as those before the national court, there appears to be an increasing number of cases where the Court makes general statements only and then leaves the application of its interpretation to the national court. That seems to be the case in particular in relation to the question of whether a given case involves direct or indirect discrimination.

Szpital Kliniczny[107] is a case in point. The case before the national court involved a psychologist with a disability who worked at a hospital. The hospital decided to give a monthly allowance to workers who submitted their disability certificates *after* a given staff meeting, to the exclusion of those who had already submitted their certificates *before* the meeting (a group that included the applicant). The national court referred the following question to the CJEU:

> 'Should Article 2 of [Directive 2000/78] be interpreted as meaning that the differing treatment of individual members of a group distinguished by a protected characteristic (disability) amounts to a breach of the principle of equal treatment if the employer treats individual members of that group differently on the basis of an apparently neutral criterion, that criterion cannot be objectively justified by a legitimate aim, and the measures taken in order to achieve that aim are not appropriate and necessary?'

The Court of Justice made clear statements on the nature of the benefit as pay[108] as well as on the fact that those benefiting from an allegedly discriminatory rule do not necessarily have to be persons without a disability (i.e. discriminatory different treatment can be between different groups of persons with

107 CJEU, Case C-16/19 *VL v Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, 26 January 2021, ECLI:EU:C:2021:64 (Grand Chamber).

108 CJEU, Case C-16/19 *VL v Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, 26 January 2021, ECLI:EU:C:2021:64 (Grand Chamber), paragraph 23.

disabilities.[109] In contrast, the Court did not indicate whether or not the rule in question amounts to either direct or indirect discrimination based on disability.[110] Instead, it left the matter to the national court.[111]

II WORDING AND MAIN ELEMENTS OF THE DEFINITION

According to Article 2(2)(b) of the Directive 2000/43,

> 'indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.'

The wording of the corresponding definition in Directive 2000/78 is somewhat more complex, due, first, to the relevance of several different discrimination criteria, and, secondly, to an additional part concerning reasonable accommodation. Article 2(2)(b) provides that

> 'indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:
> (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or
> (ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.'

The use of the words 'provision, criterion or practice' in these definitions shows that the legal concept of indirect discrimination under EU law relates to measures in a broad sense.[112]

Building on this starting point, the concept is characterised by two basic elements, one relating to the indirect and effects-based nature of the prohibited measure and one to the absence of objective justification. In fact, this arrangement corresponds to the case law-based definition of indirect discrimination that was developed by the CJEU, as already mentioned. The meaning of the two basic elements can be summarised as follows:[113]

Indirect and effects-based nature of the alleged discrimination:

- The existence of an apparently neutral measure, that is, a measure that is not directly linked to a forbidden discriminatory ground.
- A disparate impact resulting from the measure, that is, the measure causes a particular disadvantage for a protected group.

109 CJEU, Case C-16/19 *VL v Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, 26 January 2021, ECLI:EU:C:2021:64 (Grand Chamber), paragraph 25 and following.

110 CJEU, Case C-16/19 *VL v Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, 26 January 2021, ECLI:EU:C:2021:64 (Grand Chamber), paragraph 41 and following.

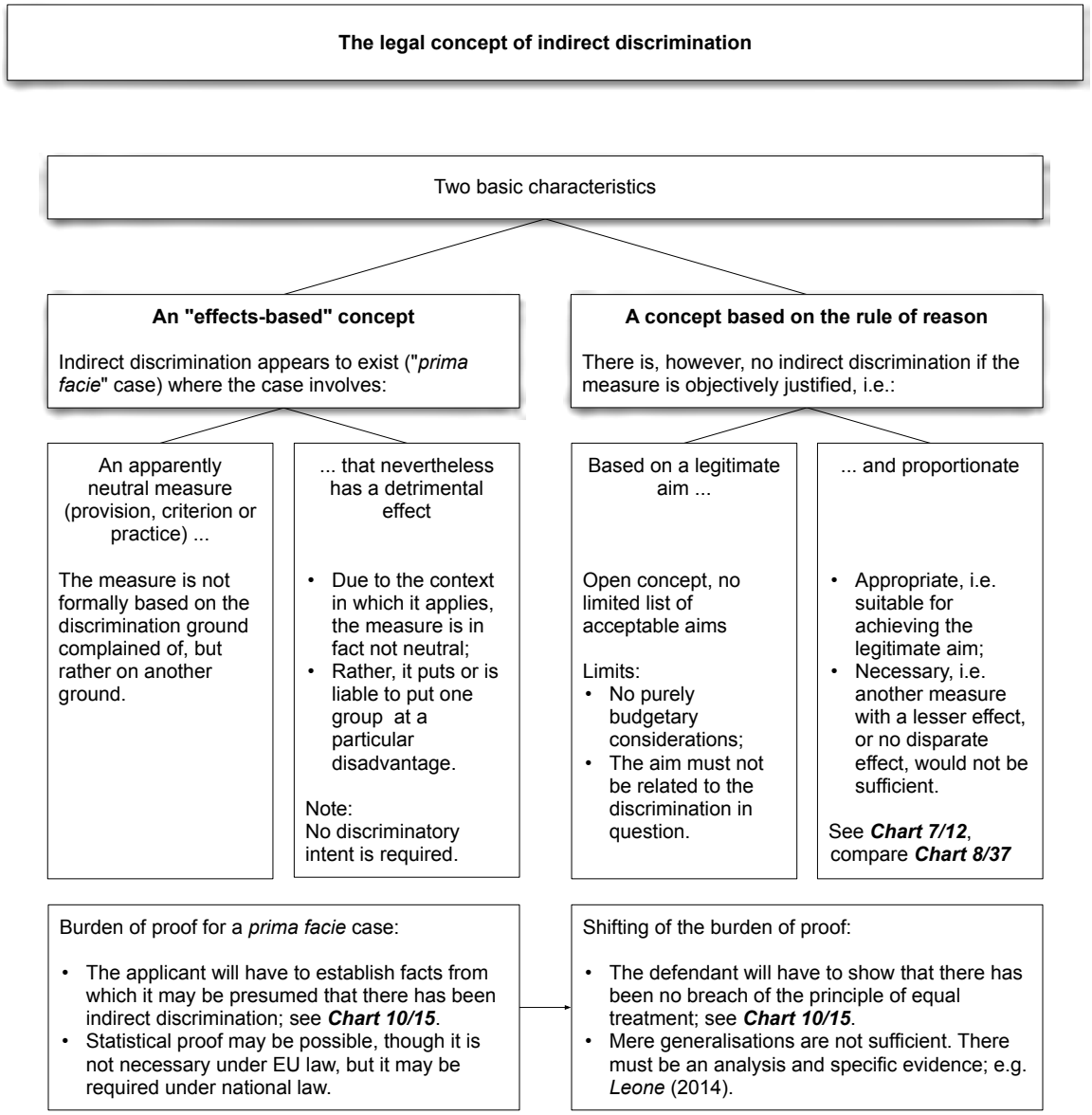
111 For example: 'Should the referring court conclude that there is direct discrimination, such discrimination cannot be justified except [...]' and 'In the present case, should the referring court, ultimately, find that the difference in treatment at issue in the main proceedings stems from an apparently neutral practice, it will still need to ascertain whether [...]', CJEU, Case C-16/19 *VL v Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, 26 January 2021, ECLI:EU:C:2021:64 (Grand Chamber), paragraphs 54 and 56.

112 Fredman, S. (2011), *Discrimination Law*, (2nd edition), Oxford: Oxford University Press, p. 179.

113 Tobler, C. (2005) *Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*, p. 211.

Absence of objective justification / possibility of objective justification

- Reliance on a legitimate aim which is independent of the prohibited criterion, that is, the measure must have an accepted, non-discriminatory aim.
- Proportionality of the measure in that context, that is:
  - The measure is appropriate (suitable) to achieve its legitimate aim;
  - The measure is necessary (requisite) in that context.



Source: Christa Tobler, Jacques Beglinger (2020) *Essential EU Law in Charts*, ***Chart 10/11.***

III INDIRECT DISCRIMINATION: AN EFFECTS-BASED CONCEPT

The most characteristic element of the concept of indirect discrimination is its focus on the detrimental *effect* of a measure, rather than on its outward appearance. Indeed, general definitions, used outside EU

aw or even outside law altogether, often focus on this particular aspect only.[114] In contrast and as noted above, the EU law definitions in Directives 2000/43 and 2000/78 also include the element of objective justification. As a consequence, detrimental effect within the meaning of the concept leads to a finding of apparent or *prima facie* (at first sight) discrimination only, i.e. a presumption of the existence of indirect discrimination that can be rebutted. Indeed, a final finding of discrimination depends on the absence of any justification, be it objective within the meaning of the legal definition of indirect discrimination or statutory (such as specific justification grounds stated in the law, such as occupational requirements under Article 4 of Directives 2000/43 and 2000/78).

Indirect discrimination as defined in Directives 2000/43 and 2000/78 requires that an apparently neutral measure would put persons belonging to a protected group (namely 'persons of a racial or ethnic origin' and 'persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation', respectively) at a particular disadvantage compared with other persons. These elements are further discussed below.

1 A measure that is not directly or inextricably linked to a prohibited ground

The starting point for any finding of indirect discrimination is a measure the basis of which is formally different from a prohibited discrimination criterion. In addition to the examples mentioned in the introduction to this report, consider the following cases:

- In a context where discrimination based on ethnic origin and religion is prohibited, a requirement relating to shaving is applied; e.g. the employees of a company must be clean-shaven;
- In a context where discrimination based on religion is prohibited, a requirement relating to clothing is applied in a general and undifferentiated way to all workers in the undertaking, e.g. the requirement that the employees of a company must not wear any headgear;
- In a context where discrimination based on disability is prohibited, a requirement relating to the donating of blood is applied, e.g. the requirement that all employees of a company must regularly donate blood;
- In a context where discrimination based on age is prohibited, a requirement relating to seniority is applied, e.g. the requirement that the applicant for a particular job has at least 20 years of experience in the relevant field;
- In a context where discrimination based on sexual orientation is prohibited, a requirement relating to the place where a seminar is held is applied; e.g. the requirement that certain employees of a company attend a seminar that is held in a particular country.

In all of these cases, the ground relied on is not expressly a characteristic protected under EU non-discrimination law. Instead, it is 'ostensibly' or 'at first glance' neutral.[115] Even so, as will be shown in the next section, such grounds may lead to indirect discrimination prohibited under Directive 2000/43 and 2000/78.

However, it should already be noted at this stage that CJEU case law has introduced an important twist, in that the use of a formally neutral measure does not as such necessarily exclude a finding of *direct* discrimination. For example, a measure that ties a given employment benefit to the condition of being married, to the exclusion of homosexual partners who, under the law of a specific nation are not allowed to

114 For example, according to the philosopher Thomsen, F.K. (2015) 'Stealing Bread and Sleeping Beneath Bridges – Indirect Discrimination as Disadvantageous Equal Treatment', *Moral Philosophy and Politics*, 2(2), p. 311, indirect discrimination against a person or persons with a particular property P (as opposed to persons without that property, indicated below as ¬P-persons) occurs if: '(i*) an agent treats P-persons equally to how she treats or would treat ¬P-persons, (i**) the treatment is disadvantageous to P-persons, in that (a) a greater proportion of P-persons than of ¬P-persons are negatively affected by the treatment, or (b) P-persons are more severely affected than ¬P-persons by the treatment, and (i***) it is because P-persons possess P that the treatment is disadvantageous to them.'

115 CJEU, Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia (third parties: Anelia Nikolova, Darzhavna Komisia za energiyno i vodno regulirane)*, 16 July 2015, ECLI:EU:C:2015:480 (Grand Chamber), paragraph 93.

marry, means that people in homosexual partnerships can never meet the condition in question. According to the Court, in such circumstances the criterion of marriage is not in fact 'apparently neutral'. It follows that there can be a suspicion of *indirect* discrimination only if the measure is truly 'apparently neutral'. The Court's somewhat complex case law pertaining to this matter will be discussed at a later stage in this report, in the context of the relationship between the legal concepts of direct and indirect discrimination (see further C.VI.5 below).

2 Detrimental effect of an apparently neutral measure

In cases where a truly 'apparently neutral' measure is at issue, it will depend on the circumstances whether the use of this measure raises the suspicion of indirect discrimination. This will be the case where it has, actually or potentially, a relevant detrimental effect on the people who should be protected compared with other persons. In such a case, the measure in question is only 'apparently' neutral.

Whether or not an apparently neutral measure has the required detrimental effect (also called 'disparate impact') within the meaning of the concept of indirect discrimination depends on the circumstances – both legal and factual – in which it is applied. Only if, in spite of its neutral appearance, it has or is liable to have a relevant detrimental effect on a relevant protected group as compared to the effect that it has on another group, can a measure amount to *prima facie* indirect discrimination.

a) An 'apparently' neutral measure that leads to a 'particular disadvantage'

This may be illustrated by using, again, the examples listed in the previous section, though here in reverse order.

- The requirement that certain employees attend a seminar that is held in a particular country is problematic if this is a country where homosexuality is illegal. In such a context, the requirement disadvantages the homosexual members of the staff, since they are at risk in such a country. The requirement therefore raises the presumption of indirect discrimination based on sexual orientation.
- The requirement that the applicant for a particular job has at least 20 years of experience in the relevant field disadvantages young people, since they have not yet had the time to accumulate experience of that length of time. The requirement may at the same time disadvantage women, since they may have interrupted their work, e.g. to have children and/or to care for them or for elderly family members. The requirement therefore raises the presumption of indirect discrimination based on age and sex.
- The requirement that all employees must regularly donate blood disadvantages Jehovah's Witnesses because they are opposed to blood transfusions for religious reasons. The requirement therefore raises the presumption of indirect discrimination based on religion.
- The requirement that employees do not wear any headgear disadvantages persons who belong to certain religions and who interpret these religions as requiring particular clothing, such as (certain) Muslim women and (certain) Jewish men. At the same time, this requirement also disadvantages women (in the case of the headscarf or veil) and men (in the case of the yarmulke or kippah), respectively. The requirement therefore raises the presumption of indirect discrimination based on religion and of sex.
- The requirement that employees must be clean-shaven disadvantages Sikhs, since male Sikhs do not shave for religious reasons. Sikhs are seen as both an ethnic and a religious group. The requirement therefore raises the presumption of indirect discrimination based on ethnic origin, sex and religion.

In all of these cases, the apparently neutral criterion upon closer investigation proves in fact not to be neutral but rather to have a detrimental effect in particular for people who are covered by a prohibited discrimination ground.

b) *Disadvantage to persons of a 'particular' sub-type of the ground in question*

Under Article 2(2)(b) of Directive 2000/78, the concept of indirect discrimination requires that the apparently neutral ground would put persons having 'a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation' at a disadvantage. According to this wording, in the specific context of *indirect* discrimination it is not sufficient that a measure tends to disadvantage, for example, persons of faith in general. Instead, those indirectly disadvantaged must be of a *particular* religion or belief. It is interesting to note that this approach was not part of the Commission's proposals for the Directive in either the original[116] or the amended proposal,[117] but apparently entered the text during the (difficult) negotiations within the Council. Gerards has noted that no comparable requirement exists under the indirect discrimination case law on the ECHR.[118]

An instructive example of the application of this approach in the context of religion can be seen in the CJEU case of *WABE and Müller*, and more specifically in the contrast between the two cases involved. Both cases concerned rules of employers on what their employees are allowed to wear to work.

The *Müller* case involved the instruction to the employees to attend the workplace without conspicuous, large-sized signs of any political, philosophical or religious beliefs. The Court noted that such a rule may amount to *direct* discrimination, since the criterion in question is inextricably linked to one or more specific religions or beliefs.[119] Note that, since in the context of *direct* discrimination there is no requirement for 'a particular religion or belief', persons of more than one religion may be affected[120] (i.e. in a case like *Müller* notably Muslim women, and Jewish and Sikh men).[121]

The employer in the *WABE* case, who runs childcare centres, adopted 'Instructions on observing the requirement of neutrality' to be observed by the employees. Among the obligations imposed on those employees who are in contact with parents or children, was that of not wearing 'any signs of their political, philosophical or religious beliefs that are visible to parents, children and third parties in the workplace'. The CJEU began by ruling out direct discrimination based on religion, provided that the rule in question is applied in a general and undifferentiated way (in the case at hand, there appeared to be evidence to this effect).[122] With respect to indirect discrimination, the national court had noted that the rule in question concerns certain religions more than others and affects women more than men (however, the CJEU did

116 Amended Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation, COM(2000) 652 final. In both cases, the definition then proposed by the Commission was as follows: 'indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice is liable to affect adversely a person or persons to whom any of the grounds referred to in Article 1 applies, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving it are appropriate and necessary.'

117 CJEU, Case C-310/10 *Ministerul Justiției și Libertăților Cetățenești v Ștefan Agafiței and Others*, 7 July 2011, ECLI:EU:C:2011:467.

118 Gerards, J. (2020) 'Non-Discrimination, the European Court of Justice and the European Court of Human Rights: Who takes the Lead?', in: Giegerich, T. (ed) and Backes, C., Jungfleisch, J. (asst. eds), *The European Union as Protector and Promoter of Equality*, Cham: Springer, p. 143.

119 CJEU, Joined Cases C-804/18 and C-341/19 *IX v WABE eV and MH Müller Handels GmbH v MJ*, 15 July 2021, ECLI:EU:C:2021:594 (Grand Chamber), paragraph 73; see further C.VI.5 below.

120 Obviously, direct discrimination may also be aimed at one particular religion only. An example is provided by *Cresco*, where the rule in question was applied only to employees of the catholic Christian faith; CJEU, Case C-193/17 *Cresco Investigation GmbH v Markus Achatzi,* 22 January 2019, ECLI:EU:C:2019:43 (Grand Chamber).

121 At the same time, the Court insists that these must be *specific* religions (if possibly more than one). According to the Court, Directive 2000/78 does not limit the circle of persons in relation to whom a comparison may be made in order to identify discrimination on the grounds of religion or belief to those who do not have a particular religion or belief (CJEU, Joined Cases C-804/18 and C-341/19 *IX v WABE eV and MH Müller Handels GmbH v MJ*, 15 July 2021, ECLI:EU:C:2021:594 (Grand Chamber), paragraphs 50 and 51). Accordingly, it cannot be argued generally that disadvantageous treatment of believers in general (as compared to non-believers) in itself amounts to discrimination. In academic writing, this approach has been criticised. For example, Eleni Frantziou finds it very difficult to understand why the Court only finds discrimination that targets specific religions to be directly discriminatory, rather than classifying as such all rules that restrict the wearing of religious symbols; Frantziou, E. (2021) 'Joined cases C-804/18 and C-341/19, *IX* v *WABE eV* and *MH Muller Handels GmbH* v *MJ*: religious neutrality in a private workplace? Employer friendly and far from neutral', *European Law Review* No. 5, p. 680. See also Mulder, J. (2022) 'Religious neutrality policies at the workplace: Tangling the concept or direct and indirect religious discrimination. *WABE and Müller*', *Common Market Law Review* 59, p. 1509.

122 CJEU, Joined Cases C-804/18 and C-341/19 *IX v WABE eV and MH Müller Handels GmbH v MJ*, 15 July 2021, ECLI:EU:C:2021:594 (Grand Chamber), paragraph 52.

not address the issue of multiple sex discrimination; see further D.V below). The CJEU stated that for the purposes of indirect discrimination based on religion, those affected must be persons adhering to a *particular* religion or belief. It was for the national court to verify that point in the case at hand, keeping in mind that court's own finding that the rule at issue concerned, statistically, almost exclusively female workers who wear a headscarf because of their Muslim faith. For the purposes of its own preliminary ruling, the CJEU therefore started from the premise that that rule in question did indeed constitute a difference of treatment *indirectly* based on religion. In other words, in the *WABE* case the Court thought that there was indeed a particular disadvantage to persons of a particular faith, namely the Muslim faith.

It should be noted, however, that the Court's case law on the requirement of a particular disadvantage to 'a particular sub-type' of the discrimination ground appears to differ depending on the discrimination ground. Whilst there is, as yet, no case law that would indicate the existence of indirect discrimination based on sexual orientation, in cases on indirect discrimination based on disability and based on age the Court appears not to insist on a 'particular' disability or a 'particular' age, in spite of the wording of the law.

Age discrimination cases are mostly cases involving direct discrimination. However, no such direct discrimination was at issue in *Gesturi*.[123] The case involved national legislation that prohibited retired persons from participating in calls for expressions of interest for the granting, by public administrative authorities, of analysis and consultancy roles. The Court found that such legislation establishes an indirect differentiation on the grounds of the age, without referring to a 'particular' age. Indeed, it might be argued that retirement can be entered into at different ages and that, more generally, age is a fluid criterion, which is why it would not make sense to insist on a 'particular' age for the purposes of indirect discrimination.

Similarly, there appears to be no requirement for a 'particular' disability for the purposes of indirect discrimination. For example, the *Ruiz Conejero*[124] case concerned a cleaner who suffered from obesity, which was recognised as partial disability (a fact which, however, was not known by the employer). Lawful absences from work due to illness linked to the disability led to his dismissal based on national law, which set thresholds of intermittent sickness absence for dismissal. The Court in this case reiterated that illness and disability are not the same. Still, it noted that a criterion based on illness is liable to place disabled workers at a disadvantage and so to bring about a difference of treatment indirectly based on disability. The Court in this context makes no reference to a requirement for a 'particular' disability (see also *Ring and Skouboe Werge*, in relation to the *Skouboe Werge* case). Indeed, it might perhaps be argued that there are so many different types of disability, that it would be unreasonable to require a particular disadvantage to people with a 'particular' type of disability.

Finally, the CJEU insists on the requirement of a specific sub-type of the discrimination ground in relation to racial or ethnic origin, even though Article 2(2)(b) of Directive 2000/43 merely refers to 'persons of a racial or ethnic origin' who are put at a particular disadvantage (rather than to persons of a 'particular' racial or ethnic origin). The *Jyske Finans* case[125] provides an illustrative example. This case concerned an internal procedure of a credit institution that required persons applying for a loan to purchase a car who had produced as a form of identification a driving licence indicating a country of birth other than a Member State of the EU or of the European Free Trade Association (EFTA) to provide an additional proof of identity, in the form of a copy of a passport or residence permit. The applicant in this case, Mr Huskic, was a Danish national born in Bosnia and Herzegovina. The Danish Equal Treatment Board found indirect discrimination based on ethnic origin and awarded compensation. The District Court of Viborg upheld that finding but expressed the view that the case involved direct rather than indirect discrimination. The next

123 CJEU, Case C-670/18 *CO v Comune di Gesturi*, 2 April 2020, ECLI:EU:C:2020:272.
124 CJEU, Case C-270/16 *Carlos Enrique Ruiz Conejero v Ferroser Servicios Auxiliares SA, Ministerio Fiscal,* 18 January 2018, ECLI:EU:C:2018:17.
125 CJEU, Case C-668/15 *Jyske Finans A/S v Ligebehandlingsnævnet, acting on behalf of Ismar Huskic,* 6 April 2017, ECLI:EU:C:2017:278.

instance on the national level, namely the High Court of Western Denmark, turned to the CJEU with a request for a preliminary ruling on the matter.

The CJEU ruled out direct ethnic discrimination due to the fact that 'ethnic origin' cannot be determined by a single criterion such as the country of birth, which was the only relevant criterion in Mr Huskic's case.[126] With respect to indirect discrimination, the Court stated that the words 'particular disadvantage' must be understood as meaning that it is particularly persons of a 'given' ethnic origin who are at a disadvantage because of the measure at issue.[127] However, this interpretation is not evident from the Directive's wording. With respect to the criterion of the country of origin about which Mr Huskic complained, the Court noted that it is applicable without distinction to all persons born outside the territory of a Member State of the European Union or the EFTA. The Court then reiterated that 'the concept of "indirect discrimination" within the meaning of Article 2(2)(b) of Directive 2000/43 is applicable only if the allegedly discriminatory measure has the effect of placing a person of a particular ethnic origin at a disadvantage'.[128] According to the Court, the fact that the criterion in question applied only to countries other than a Member State of the European Union or the EFTA did not make it sufficiently specific for those purposes. In addition, the Court recalled that ethnic origin cannot generally be presumed on the sole basis of a person's country of birth. Accordingly, the Court also ruled out indirect discrimination in a case such as that of Mr Huskic.

It should also be noted that the same limiting condition does not apply in the context of discrimination based on nationality under EU internal market law. It is notably missing from the Court's definition of indirect discrimination in the leading case of *O'Flynn,*[129] in the context of what is now Article 45 TFEU on the free movement of workers: 'It follows from all the foregoing case-law that, unless objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage.' Here, the Court generally refers to 'migrant workers' (meaning nationals of other Member States *generally*).

This difference between discrimination based on nationality and based on racial or ethnic origin is relevant in the case of *Land Oberösterreich*.[130] The case concerned legislation of a Member State applicable to all third-country nationals without distinction and under which the granting of housing assistance to third-country nationals who are long-term residents was subject to the condition that they provide proof, in a form specified by that legislation, that they have a basic command of the language of that Member State. The criterion at issue in this case was, therefore, the status of long-term residents.

In relation to Directive 2000/43, the Court held that such a case does not involve indirect discrimination based on ethnicity. First, it noted that the Directive is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment that arises from the legal status of the third-country nationals and stateless persons concerned. Secondly, it reiterated that the concept of indirect discrimination within the meaning of Article 2(2)(b) of Directive 2000/43 is applicable only if the allegedly discriminatory measure has the effect of placing a person of a *particular* ethnic origin at a disadvantage.[131] Interestingly, the Court's finding was different in relation to equal treatment/non-discrimination based on nationality under

126 CJEU, Case C-668/15 *Jyske Finans A/S v Ligebehandlingsnævnet, acting on behalf of Ismar Huskic,* 6 April 2017, ECLI:EU:C:2017:278, paragraph 16 and following.
127 CJEU, Case C-668/15 *Jyske Finans A/S v Ligebehandlingsnævnet, acting on behalf of Ismar Huskic*, 6 April 2017, ECLI:EU:C:2017:278, paragraph 27; The same statement had already been made before in *Nikolova*, paragraph 100, to which the Court refers in *Jyske Finans*. However, in that earlier case the issue did not attract much attention as there it was clear that the disadvantage affected a given ethnic group in particular, namely Roma people.
128 CJEU, Case C-668/15 *Jyske Finans A/S v Ligebehandlingsnævnet, acting on behalf of Ismar Huskic,* 6 April 2017, ECLI:EU:C:2017:278, paragraph 13.
129 CJEU, Case C-237/94 *John O'Flynn v Adjudication Officer*, 23 May 1996, ECLI:EU:C:1996:206, paragraph 20.
130 CJEU, Case C-94/20 *Land Oberösterreich v KV,* 10 June 2021, ECLI:EU:C:2021:477.
131 CJEU, Case C-94/20 *Land Oberösterreich v KV,* 10 June 2021, ECLI:EU:C:2021:477, paragraph 50 and following.

Article 11(1) of Directive 2003/109.[132] Here, the Court held that, provided that a given case falls within the material scope of the provision, Article 11(1) precludes the type of rule in question.[133] This finding, therefore, implies indirect discrimination based on nationality.

Valentine[134] has argued in her annotation on the *Maniero*[135] case (where the Court also ruled out indirect discrimination based on ethnic origin), that the Court's narrow interpretation of Article 2(2)(b) of Directive 2000/43 risks losing sight of the Directive's objective of effectively combating xenophobia and racism. Indeed, Valentine notes that xenophobic behaviour or discrimination against supposed foreigners is in most cases not based on concrete ideas of 'descent' and 'ethnicity', but is in itself diffuse and prejudiced.

3 Irrelevance of discriminatory intent

A particularly important aspect of the effects-based nature of the concept of indirect discrimination lies in the fact that intention on the side of the discriminator is not part of the definition of the concept. Instead, what is decisive is the *effect* of the measure in question.[136] As AG Poiares Maduro explained in his opinion on the *Coleman* case: 'In fact, this is the whole point of the prohibition of indirect discrimination: even neutral, innocent or good faith measures and policies adopted with no discriminatory intent whatsoever will be caught if their impact on persons who have a particular characteristic is greater than their impact on other persons. It is this "disparate impact" of such measures on certain people that is the target of indirect discrimination legislation.'[137]

Fredman (who in this context also quotes AG Poiares Maduro) argues that the situation is different in the case of direct discrimination, since this form of discrimination is, precisely, 'distinctive in its focus on a perpetrator's actions and the reason for those actions'.[138] There is, therefore, a necessary link between the treatment and the reason for it. However, it should be noted that even in the case of direct discrimination the legal definition in Article 2(2)(a) of Directives 2000/43 and 2000/78 does not mention intent. Rather, what is required is that the disadvantageous treatment is, objectively, based on the ground in question. Ellis and Watson explain: 'No intention or subjective motivation is required; it is enough simply that the adverse treatment received by the victim is grounded upon, or caused by, a prohibited classification.'[139] However, as noted by Bell, there is a certain tension between questions of causation and the irrelevance of motive in the context of direct discrimination.[140]

IV INDIRECT DISCRIMINATION: A CONCEPT THAT INCLUDES OBJECTIVE JUSTIFICATION

An apparently neutral measure with a disparate effect amounts to indirect discrimination only if it is not objectively justified (or does not fall under a statutory derogation). In the specific context of EU law, objective justification is now an established element that is part of the definition of the concept

132 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ 2004 L 16/44.
133 CJEU, Case C-94/20 *Land Oberösterreich v KV,* 10 June 2021, ECLI:EU:C:2021:477, paragraph 34 and following.
134 Valentin, S. (2019) 'Die einschränkende Auslegung des Diskriminierungsverbots wegen der "ethnischen Herkunft" durch den EuGH', *Neue Zeitschrift für Arbeitsrecht* 2019/6, as of p. 365.
135 CJEU, Case C-457/17 *Heiko Jonny Maniero v Studienstiftung des deutschen Volkes eV*, 15 November 2018, ECLI:EU:C:2018:912. This case concerned a condition for a scholarship in order to support legal studies abroad according to which the applicant must have passed the German 'First State Examination'. The applicant was an Italian who had studied law in Armenia.
136 See, e.g. Tobler, C. (2005) *Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*, p. 235; Mulder, J. (2021) *Indirect sex discrimination in employment*, p. 44.
137 CJEU, Case C-303/06 *S. Coleman v Attridge Law and Steve Law*, 17 July 2008, ECLI:EU:C:2008:61 (Opinion of AG Poiares Maduro), paragraph 19.
138 See also Fredman, S. (2011), *Discrimination Law*, p. 203.
139 Ellis, E., Watson, P. (2012) *EU Anti-Discrimination Law*, p. 163.
140 Bell, M. (2007) 'Direct discrimination', in: Schiek, D., Waddington, L., Bell, M. (eds) *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Oxford: Hart Publishing, p. 233.

of indirect discrimination (though it was absent in the very early case law on the matter).[141] Indeed, Collins[142] notes that objective justification is a core feature and a key element of the legal framework of indirect discrimination law. De Vos[143] points out that justification is a double-edged sword: on the one hand, it allows genuine and legitimate aims to stand, while on the other, parties (e.g. employers) run the risk of exposure to indirect discrimination claims if their organisation or practices have actual or potential indirect discriminatory impact and are not determined by legitimate aims in an effective and proportionate way. The function and the elements of objective justification are discussed in more detail in the following section.

1 Elements and function of the concept of objective justification

Under the definition of indirect discrimination in Directives 2000/43 and 2000/78, objective justification means that a measure leading to apparent indirect discrimination has a legitimate aim and that the means chosen to achieve that aim are proportionate, i.e. appropriate and necessary. According to the Court's case law, all of these elements must be interpreted strictly (e.g. *WABE and Müller).*[144] This is in line with a general approach under EU law, according to which derogations from rights must be interpreted narrowly.[145]

Fredman[146] states that justification means to explain the requirement in question. There is an academic debate on the question of whether the element of (objective) justification is indeed an issue of justification (i.e. a defence or an overriding reason) or rather an issue of causation (i.e. a reason different from discrimination that caused and explains the disadvantageous treatment).[147] How this matter is perceived, may also depend on the legal order at issue. For example, Fredman[148] in her seminal book on discrimination law refers to case law handed down in the context of the law of the United Kingdom of Great Britain and Northern Ireland (UK), stating that although indirect discrimination can be justified, direct discrimination cannot. It is logical from this perspective that reasons that, in Fredman's words, can 'displace a finding of discrimination', tend to be seen in the context of causation rather than that of a defence.

As for EU law, Mulder finds that CJEU case law has not clearly endorsed one approach over the other.[149] In fact, it should be noted that the Court, in relation to EU law provisions that allow for different treatment, has referred to 'an exception to the principle of the prohibition of discrimination' (e.g. *Prigge,*[150]). As far as indirect discrimination is concerned, Mulder argues that the causation approach seems to be more in line with the EU legal definition of the concept, since the absence of objective justification is a negative constituting element for the existence of indirect discrimination. However, as this author notes, ultimately the dispute on these matters may be of little practical relevance. Indeed, what matters for the victim of alleged discrimination as well as for the alleged perpetrator is the question of whether or not the latter may try to rely on certain excuses.

141 Originally, it was not part of the concept; see Tobler, C. (2005) *Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*, p. 184 and following.
142 Collins, H. (2018) 'Justice for Foxes: Fundamental Rights and Justification for Indirect Discrimination', in: Collins, H., Khaitan, T. (eds) (2018) *Foundations of Indirect Discrimination Law*, Oxford: Hart Publishing, p. 251.
143 E.g. De Vos, M. (2020) 'The European Court of Justice and the march towards substantive equality in European Union anti-discrimination law', *International Journal of Discrimination and the Law*, Vol. 20, p. 71.
144 CJEU, Joined Cases C-804/18 and C-341/19 *IX v WABE eV and MH Müller Handels GmbH v MJ*, 15 July 2021, ECLI:EU:C:2021:594 (Grand Chamber), paragraphs 60 and 61.
145 For a leading case in EU internal market law, see CJEU, Case 113/80 *Commission v Ireland*, 17 June 1981, ECLI:EU:C:1981:139, paragraph 7, in the context of the free movement of goods.
146 Fredman, S. (2016), 'The Reason Why: unravelling indirect discrimination', p. 231.
147 As Collins puts it: 'defence or ingredient'; Collins, H. (2018) 'Justice for Foxes: Fundamental Rights and Justification for Indirect Discrimination', p. 257.
148 Fredman, S. (2011), *Discrimination Law*, p. 190. In the same vein, see also Ellis, E., Watson, P. (2012) *EU Anti-Discrimination Law*, p. 171.
149 Mulder, J. (2021) *Indirect sex discrimination in employment*, p. 71 and following.
150 CJEU, Case C-447/09 *Reinhard Prigge, Michael Fromm, Volker Lambach v Deutsche Lufthansa AG,* 13 September 2011, ECLI:EU:C:2011:573, paragraphs 56 and 72, both in relation to specific statutory justification grounds under Directive 2000/78.

2 Objective justification and the distribution of competences between the EU and its Member States

The EU rules on objective justification have to be seen against the backdrop of the distribution of competences between the EU and its Member States. In the field of social and employment policy, the EU merely has a complementary and supporting competence in the social field (Articles 147 and 153 TFEU). Accordingly, the Court has held that when the Member States in the context of objective justification rely on social and employment policy aims, they enjoy a broad discretion not only in choosing the aims that they wish to pursue in these fields but also in choosing the measures that they wish to employ in this context (e.g. *Ruiz Conejero).*[151] At the same time, the Court has underlined that the use of the Member States' margin of discretion 'cannot have the effect of frustrating the implementation of the principle of nondiscrimination' (e.g. *Andersen*[152]*).*

As a result, the Court sometimes applies a rather light touch in relation to measures adopted by the Member States (see further D.IV below).

3 Legitimate aim

a) An open-ended concept that is typical for indirect discrimination

Objective justification requires first of all a legitimate aim, which is an open concept that is not limited to a closed list of grounds.

In contrast and as a rule, in EU law direct discrimination can only be justified on the basis of derogation grounds that are explicitly and specifically listed in the law.[153] In other words, openly formulated justification is normally not available in the case of direct discrimination. There are, however, exceptions where the derogation possibilities for direct discrimination are worded in a somewhat broader manner. This includes in particular 'objective and reasonable' justification for direct age discrimination under Article 6(1) of Directive 2000/78 (as exemplified in many CJEU decisions on direct age discrimination since the first such case, *Mangold*).[154] Other examples concern objective justification for direct sex discrimination under Article 4(5) of the Sex Equality Goods and Services Directive 2004/113,[155] for direct discrimination against part-time workers under Clause 4(1) of the Part-Time Work Directive 97/81[156] and for direct discrimination against fixed-term workers under Clause 4(1) of the Fixed-Term Work Directive 1999/70.[157]

b) Legitimacy of the aim

i A broad concept

What then is an aim legitimate for the purposes of objective justification? The fact that the concept is open-ended means that there is potentially a broad range of grounds that may be acceptable.

151 CJEU, Case C-270/16 *Carlos Enrique Ruiz Conejero v Ferroser Servicios Auxiliares SA, Ministerio Fiscal,* 18 January 2018, ECLI:EU:C:2018:17, *paragraph 43.*

152 CJEU, Case C-499/08 *Ingeniørforeningen i Danmark, acting on behalf of Ole Andersen v Region Syddanmark,* 12 October 2010, ECLI:EU:C:2010:600 (Grand Chamber), paragraph 33.

153 E.g. CJEU, Case C-267/12 *Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, 12 December 2013, ECLI:EU:C:2013:823, paragraph 45 ; CJEU, Case C-16/19 *VL v Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, 26 January 2021, ECLI:EU:C:2021:64 (Grand Chamber), paragraph 54.

154 CJEU, Case C-144/04 *Werner Mangold v Rüdiger Helm*, 22 November 2005, ECLI:EU:C:2005:709 (Grand Chamber).

155 Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ 2004 L 373/37.

156 Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, OJ 1998, L 14/9 (as amended).

157 Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ 1999 L 175/43 (as amended).

However, for the specific case of 'objective and reasonable justification' for age discrimination under Article 6(1) of Directive 2000/78, the text of that provision defines a certain framework:[158]

> 'Notwithstanding Article 2(2), Member States may provide that differences of treatment based on age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.
> Such differences of treatment may include, among others:
> (a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
> (b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
> (c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.'

According to this wording, the derogation must be provided for by the Member State and the difference in treatment must be 'objectively and reasonably justified' by 'a legitimate aim', for which examples are given. In *Prigge,*[159] the Court found that while the list given in the text with respect to such aims is not exhaustive, the legitimate aim set out in that provision must in any case be related to employment policy, labour market and vocational training. For example, the Court held that the aim of guaranteeing traffic safety in air transport cannot constitute a legitimate social policy aim under Article 6(1) of Directive 2000/78 (however, it is covered by the statutory derogation set out in Article 4(1) of the same directive, which concerns genuine occupational requirements).[160]

Generally, case law shows that, within the above framework, the CJEU relatively easily accepts that a given aim as such is legitimate, and that a considerably greater challenge follows on the subsequent level of judging the proportionality of the measure chosen to achieve that aim (i.e. the measure's appropriateness and necessity; see further C.IV.4 below).

The following are some examples for aims found to be legitimate by the Court, in the context of indirect discrimination:

- In relation to indirect discrimination based on religion or belief and measures taken by employers, the Court found the employer's wish to pursue a policy of neutrality towards its customers to be legitimate (*Achbita*, *WABE and Müller*).
- In relation to indirect discrimination based on race or ethnic origin and measures taken by an electricity provider, the Court found the aims of preventing fraud and abuse, of protecting individuals against the risks to their life and health involved in the tampering with electricity and of ensuring the quality and security of electricity distribution in the interest of all consumers to be legitimate (*Nikolova*).
- In relation to indirect discrimination based on disability and national law about dismissal, the Court found the aim of combating absenteeism from work to be legitimate (*Ruiz Conejero*) as well as the aim of encouraging the recruitment (here) of persons with disabilities (*Ring and Skouboe Werge*);

158 See generally Horton, R. (2019) 'Justifying Age Discrimination in the EU', in: Belavusau, U., Henrard, K. (eds) (2019) *EU Anti-Discrimination Law Beyond Gender*, Oxford: Hart Publishing, 273-293.
159 CJEU, Case C-447/09 *Reinhard Prigge, Michael Fromm, Volker Lambach v Deutsche Lufthansa AG,* 13 September 2011, ECLI:EU:C:2011:573, paragraph 80.
160 CJEU, Case C-447/09 *Reinhard Prigge, Michael Fromm, Volker Lambach v Deutsche Lufthansa AG,* 13 September 2011, ECLI:EU:C:2011:573, paragraphs 68 and 69.

– In relation to indirect age discrimination and Article 6(1) of Directive 2000/78, the Court found legitimate the aim to improve opportunities to enter the labour market for certain categories of workers, such as the promotion of access to a profession for young people, and of establishing an age structure in the workforce that balances young and older workers (*Commune di Gesturi*), and the aim to guarantee the provision of an occupational old age pension whose calculation aims to establish a balance between different interests at issue (*Kleinsteuber*).[161]

ii A concept with important limits

Whilst the general concept of a 'legitimate aim' is a broad one, there are certain important limits, which were first developed in the Court's sex equality case law[162] and which now also apply under Directives 2000/43 and 2000/78.

First, purely budgetary considerations can never serve as an objective justification. Although budgetary considerations may underlie a Member State's choice of social policy and influence the nature or scope of the social protection measures which it wishes to adopt, they do not in themselves constitute an aim pursued by that policy and cannot therefore justify discrimination. Thus, the Court confirmed in *Szpital Kliniczny*[163] that the mere wish to save money cannot in itself be a legitimate aim. This is true even in a situation of an acute economic crisis (*AB*[164]*)*. In fact, this limit is of a general nature: it applies both to statutory justification and to objective justification (and it also applies in EU economic law).[165]

Secondly, the aim in question must be unrelated to discrimination based on the criterion in question. Thus, the Court held in *Nikolova*[166] in the context of the burden of proof, that, once a *prima facie* case of discrimination has been made by the applicant, the respondent will have to prove that the measure at issue is based 'exclusively on objective factors unrelated to any discrimination' covered by the relevant EU legislation (see also, e.g. *Asociația Accept*[167] and *Coleman*[168]). In other words, it is not possible to rely on the very fact that causes the disparate impact. Rather, the objective factor must relate to a different factor or aim.

Thirdly, an aim can be legitimate only if there is a genuine need for it. For example, in *WABE and Müller* the Court accepted that the desire of an employer to pursue a policy of neutrality with respect to religion and belief towards its customers is in itself a legitimate aim. However, it added that the mere desire to pursue such a policy 'is not sufficient, as such, to justify objectively a difference of treatment indirectly based on religion or belief, since such a justification can be regarded as being objective only where there is a genuine need on the part of that employer, which it is for that employer to demonstrate'.[169] The Court went on to explain that in order to establish such a need, account may be taken, in the first place, of the rights and legitimate wishes of customers or users – in this case, the parents of children cared for in childcare facilities run by WABE. For example, this includes the parents' right to ensure the education and teaching of their children in accordance with their religious, philosophical and teaching beliefs (as guaranteed under Article 14 CFR) or their wish to have their children supervised by persons who do not

161 CJEU, Case C-354/16 *Ute Kleinsteuber v Mars GmbH,* 13 July 2017, ECLI:EU:C:2017:539.
162 See in particular, CJEU, Case C-196/02 *Vasiliki Nikoloudi v Organismos Tilepikoinonion Ellados AE*, 10 March 2005, ECLI:EU:C:2005:141, paragraph 49 and following.
163 CJEU, Case C-16/19 *VL v Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, 26 January 2021, ECLI:EU:C:2021:64 (Grand Chamber), paragraph 59.
164 CJEU, Case C-511/19 *AB v Olympiako Athlitiko Kentro Athinon – Spyros Louis,* 15 April 2021, ECLI:EU:C:2021:274, paragraph 34 and following.
165 For an example, see CJEU, Case 238/82 *Duphar BV and others v The Netherlands State*, 7 Feburary 1984, ECLI:EU:C:1984:45, paragraph 23, with a reference to Case 7-61 *Commission v Italy*, 19 December 1961, ECLI:EU:C:1961:31, in the context of the free movement of goods.
166 CJEU, Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia (third parties: Anelia Nikolova, Darzhavna Komisia za energiyno i vodno regulirane)*, 16 July 2015, ECLI:EU:C:2015:480 (Grand Chamber), paragraph 85.
167 CJEU, Case C-81/12 *Asociația Accept v Consiliul Național pentru Combaterea Discriminării,* 25 April 2013, ECLI:EU:C:2013:275, paragraph 56.
168 CJEU, Case C-303/06 *S. Coleman v Attridge Law and Steve Law*, 17 July 2008, ECLI:EU:C:2008:415 (Grand Chamber), paragraph 55.
169 CJEU, Joined Cases C-804/18 and C-341/19 *IX v WABE eV and MH Müller Handels GmbH v MJ*, 15 July 2021, ECLI:EU:C:2021:594 (Grand Chamber), paragraph 64.

manifest their religion or belief when they are in contact with the children with the aim, among other things, of guaranteeing the free and personal development of children as regards religion, belief and policy, as stated in the employer's internal rules.[170] The Court added that of particular relevance will be evidence adduced by the employer that, in the absence of such a policy of political, philosophical and religious neutrality, its freedom to conduct a business (recognised in Article 16 CFR) would be undermined in that, given the nature of its activities or the context in which they are carried out, it would suffer adverse consequences.[171] Similarly, the Court held in *Nikolova* that the aim of combating fraud and abuse in a situation of allegedly numerous instances of damage to electricity meters, tampering with them and unlawful connections, can be invoked by a provider of electricity only if that provider at the very least establishes objectively the actual existence and extent of that unlawful conduct and of a current, major risk in the district concerned that such damage to meters and unlawful connections will continue.[172]

4 Proportionality

Measures taken in view of a legitimate aim must be proportionate. As the Court stated in *Mangold,*[173] '[o]bservance of the principle of proportionality requires every derogation from an individual right to reconcile, so far as is possible, the requirements of the principle of equal treatment with those of the aim pursued'. The definitions of indirect discrimination in Directives 2000/43 and 2000/78 shows that the standard for proportionality required by EU law is high: it is not sufficient that a measure is merely convenient or desirable; rather, it must be 'appropriate and necessary'. Below, the elements defining proportionality are discussed in more detail. The discussion will add a third element of proportionality that does not appear explicitly in the legal provisions on objective justification but that is occasionally mentioned by the Court.

a) Appropriate (or suitable) measure

Under the Court's case law, a measure taken in view of a legitimate aim is appropriate if it is suitable for achieving the aim in question.

For example, the *Kücükdeveci* case concerned a national German law whereby periods worked before the age of 25 did not count for calculating the length of the notice period for dismissal. The national court in this case indicated that the aim of the national law was to afford employers greater flexibility in personnel management by alleviating the burden on them in respect of the dismissal of young workers, from whom it is reasonable to expect a greater degree of personal or occupational mobility. However, the CJEU found that the type of legislation at issue was not appropriate for achieving that aim, since it applied to all employees who join the undertaking before the age of 25, whatever their age at the time of dismissal.[174] In other words, as the rule was not in fact aimed specifically at young workers, it could not be relied on in the context of an aim related, precisely, to young workers.

Similarly, *Hütter*[175] concerned a system under national law according to which public servants were paid less if they had done their apprenticeship early in life (periods done before 18 years of age did not count). The Member State indicated that one of the aims of its legislation was to promote integration into the labour market of young people who had pursued a vocational education. In this respect, the Court

170 At the same time, the Court has been criticised for failing to explore whether a neutrality policy is really a necessary and appropriate measure to correspond to parents' legitimate expectations; Mulder, J. (2022) 'Religious neutrality policies at the workplace: Tangling the concept or direct and indirect religious discrimination. *WABE and Müller', Common Market Law Review* 59, p. 1516.

171 CJEU, Joined Cases C-804/18 and C-341/19 *IX v WABE eV and MH Müller Handels GmbH v MJ*, 15 July 2021, ECLI:EU:C:2021:594 (Grand Chamber), paragraph 67.

172 CJEU, Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia (third parties: Anelia Nikolova, Darzhavna Komisia za energiyno i vodno regulirane)*, 16 July 2015, ECLI:EU:C:2015:480 (Grand Chamber), paragraph 116.

173 CJEU, Case C-144/04 *Werner Mangold v Rüdiger Helm*, 22 November 2005, ECLI:EU:C:2005:709 (Grand Chamber), paragraph 65.

174 Case C-555/07 *Seda Kücükdeveci v Swedex GmbH & Co. KG.*, 19 January 2010, ECLI:EU:C:2010:21 (Grand Chamber), paragraph 40.

175 CJEU, Case C-88/08 *David Hütter v Technische Universität Graz*, 18 June 2009, ECLI:EU:C:2009:381.

noted that non-accreditation of experience acquired before the age of 18 applied without distinction to all contractual public servants, whatever the age at which they were recruited. In other words, the age criterion used did not single out a group of persons defined by their youth. Since it did not take into account people's age at the time of their recruitment, the Court found that such a rule was not appropriate for the purposes of promoting the entry into the labour market of a category of workers defined by their youth.[176]

In contrast, *Achbita* as well as *WABE and Müller* may serve as examples of cases where the Court accepted the suitability of a measure in view of the aim pursued, at least on the level of principle. Both cases concerned employers who pursued a policy of religious, philosophical and political neutrality in relation to their customers, which led them to impose prohibitions on wearing visible signs of political, philosophical or religious beliefs in the workplace (note in this context that *Achbita* and *WABE and Müller* imply a conflict of competing rights, as discussed further under D.IV.2 below). The Court found this type of measure to be, in principle, suitable or appropriate in view of the purpose in question. In *WABE and Müller*, it held that:

> '[...] it should be noted that a policy of neutrality within an undertaking, such as that referred to by the first question [...], can be effectively pursued only if no visible manifestation of political, philosophical or religious beliefs is allowed when workers are in contact with customers or with other workers, since the wearing of any sign, even a small-sized one, undermines the ability of that measure to achieve the aim allegedly pursued and therefore calls into question the consistency of that policy of neutrality'.[177]

Very importantly, the Court has added that a measure can be appropriate only if it is genuinely pursued in a consistent and systematic manner.[178] In academic writing, this element has been criticised as unduly raising the standard of justification.[179] However, that issue is not specific to non-discrimination in the social field but is equally part of the understanding of proportionality in the EU's internal market law.[180]

For example, in the case of *WABE* (which was combined with *Müller* for the purposes of the preliminary ruling procedure), it was decisive that the prohibition on wearing any visible signs of political, philosophical or religious beliefs in the workplace not only covered all religions on the level of its wording but also that it was applied equally to all religions in practice. In that context, it was not sufficient that an information sheet published by the employer answered the question whether the Christian cross, Islamic headscarf or Jewish kippah may be worn in the negative for all three religions.[181] Rather, the Court noted that WABE had not only asked the applicant in the national proceedings to remove her Islamic headscarf, but had also asked another employee wearing a Christian cross to remove that sign.[182]

176 CJEU, Case C-88/08 *David Hütter v Technische Universität Graz*, 18 June 2009, ECLI:EU:C:2009:381, paragraph 49.
177 CJEU, Joined Cases C-804/18 and C-341/19 *IX v WABE eV and MH Müller Handels GmbH v MJ*, 15 July 2021, ECLI:EU:C:2021:594 (Grand Chamber), paragraph 77.
178 E.g. CJEU, Case C-341/08 *Domnica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe,* 12 January 2010, ECLI:EU:C:2010:4 (Grand Chamber), paragraph 53; CJEU, Case C157/15 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, 14 March 2017, ECLI:EU:C:2017:203, paragraph 40; CJEU, Joined Cases C804/18 and C-341/19 *IX v WABE eV and MH Müller Handels GmbH v MJ*, 15 July 2021, ECLI:EU:C:2021:594 (Grand Chamber), paragraph 68.
179 Röbke, M. (2010) 'Höchstaltersgrenzen für Einstellung in feuerwerhrtechnischen Dienst' (Maximum age limits for employment in the fire service), *Europäische Zeitschrift für Wirtschaftsrecht*, p. 146.
180 Two examples are CJEU, Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa*, 8 September 2009, ECLI:EU:C:2009:519 (Grand Chamber), paragraph 61, in the context of the free movement of services; and Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes and Others v Saarland, Ministerium für Justiz, Gesundheit und Soziales NV*, 19 May 2009, ECLI:EU:C:2009:316 (Grand Chamber), paragraph 42, in the context of freedom of establishment.
181 CJEU, Joined Cases C-804/18 and C-341/19 *IX v WABE eV and MH Müller Handels GmbH v MJ*, 15 July 2021, ECLI:EU:C:2021:594 (Grand Chamber), paragraph 26.
182 CJEU, Joined Cases C-804/18 and C-341/19 *IX v WABE eV and MH Müller Handels GmbH v MJ*, 15 July 2021, ECLI:EU:C:2021:594 (Grand Chamber), paragraph 29.

b) *Necessary (or requisite) measure*

Under the Court's case law, a measure taken in view of a legitimate aim is necessary or requisite if there is no other measure with a lesser or no disparate effect that would achieve the same purpose. In this context, the Court has emphasised, e.g. in *Achbita*[183] and in *WABE and Müller*[184] that the measure chosen must be 'limited to what is strictly necessary'.

In *Achbita*, the Court stated that the requirement of strict necessity means that the prohibition must be limited to workers who interact with customers. Ms Achbita complained about the fact that she was dismissed because she insisted on wearing the Islamic headscarf at work. Still in the context of strict necessity, the Court stated that in such a situation the employer is obliged to check whether it is possible for the employer, without being required to take on an additional burden, to offer the employee a post not involving any visual contact with the customers, instead of dismissing her. If so, then offering another post would be a lesser measure than dismissal.[185] In fact, this latter element can be seen as a type of reasonable accommodation measure outside the field of disability.[186]

In *WABE and Müller,*[187] the Court further stated that it must be checked whether the restriction in question appears strictly necessary in view of the adverse consequences that the employer is seeking to avoid by adopting the rule. In the *WABE* case, the employer ran a childcare centre and argued that the rule prohibiting any visible sign of political, philosophical or religious beliefs was in line with the non-denominational nature of the centre and the wish to guarantee the children's individual and free development with regard to religion, belief and politics. According to WABE, in the specific case at hand this was in danger, not least in view of postings displayed by the employee in question on her personal page of a social network, which indicated, according to WABE, that she wished by her conduct to influence third parties in a targeted and deliberate manner. The CJEU left it to the national court to decide whether the requirement of strict necessity was met in this case.

c) *Rarely: proportionality in a narrow sense*

As was stated before, the legal definition of indirect discrimination under Directives 2000/43 and 2000/78 mentions two elements related to proportionality, namely that the measure taken be appropriate and necessary.

Occasionally, a third element appears in the Court's case law. In the context of Directives 2000/43 and 2000/78, *Nikolova* may serve as an example. Here, the Court held:

> 'Furthermore, assuming that no other measure as effective as the practice at issue can be identified, the referring court will also have to determine whether the disadvantages caused by the practice at issue are disproportionate to the aims pursued and whether that practice unduly prejudices the legitimate interests of the persons inhabiting the district concerned'.[188]

In other words, this third element concerns the proportionality between the disadvantage caused by the measure and the benefits of the aims pursued. However, in most cases the Court does not address this

183 CJEU, Case C-157/15 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, 14 March 2017, ECLI:EU:C:2017:203, paragraph 42.
184 CJEU, Joined Cases C-804/18 and C-341/19 *IX v WABE eV and MH Müller Handels GmbH v MJ*, 15 July 2021, ECLI:EU:C:2021:594 (Grand Chamber), paragraph 68.
185 CJEU, Case C-157/15 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, 14 March 2017, ECLI:EU:C:2017:203, paragraphs 42 and 43.
186 Compare CJEU, Case C-485/20 *XXXX v HR Rail SA,* 10 February 2022, ECLI:EU:C:2022:85, paragraph 59.
187 CJEU, Joined Cases C-804/18 and C-341/19 *IX v WABE eV and MH Müller Handels GmbH v MJ*, 15 July 2021, ECLI:EU:C:2021:594 (Grand Chamber), paragraph 69.
188 CJEU, Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia (third parties: Anelia Nikolova, Darzhavna Komisia za energiyno i vodno regulirane)*, 16 July 2015, ECLI:EU:C:2015:480 (Grand Chamber), paragraph 123.

third aspect of proportionality (and the legitimate interests of the persons concerned by the measure sometimes appear in other contexts in the Court's case law). The same picture presents itself in other fields of EU law, where this third element appears in certain cases only (e.g. *Burtscher,*[189] concerning the free movement of capital).

V DIRECTIVES 2000/43 AND 2000/78: MERE MINIMUM REQUIREMENTS

It is an important feature of Directives 2000/43 and 2000/78 that they contain minimum rules only. Articles 6(1) and 8(1), respectively, state under the heading 'minimum requirements' that Member States may introduce or maintain provisions that are more favourable to the protection of the principle of equal treatment than those laid down in the Directives.[190]

For example, the *WABE and Müller* case (which concerned discrimination on grounds of religion) raised the question of whether national constitutional provisions protecting the freedom of religion may be taken into account as more favourable provisions within the meaning of Article 8(1) of Directive 2000/78 in examining the appropriateness of a difference of treatment indirectly based on religion or belief. In answering that question, the Court recalled that the EU legislature in Directive 2000/78 did not itself effect the necessary reconciliation between the freedom of thought, conscience and religion and the legitimate aims that may be invoked in order to justify unequal treatment, for the purposes of Article 2(2)(b)(i) of that Directive, but left it to the Member States and their courts to achieve that reconciliation. Consequently, the Directive allows account to be taken of the specific context of each Member State and allows each Member State a margin of discretion in achieving the necessary reconciliation of the different rights and interests at issue, in order to ensure a fair balance between them. From that, the Court concluded that the national provisions protecting freedom of thought, belief and religion may be taken into account as provisions more favourable to the protection of the principle of equal treatment, within the meaning of Article 8(1) of Directive 2000/78, when examining what constitutes a difference of treatment based on religion or belief. The Court added specifically that, 'for example, national provisions making the justification of a difference of treatment indirectly based on religion or belief subject to higher requirements than those set out in Article 2(2)(b)(i) of Directive 2000/78 would fall within the scope of the possibility offered by Article 8(1)'.[191]

It should be noted that the Member States' freedom to go beyond the minimum protection provided by the two directives relates specifically to those aspects that are covered by those directives, such as objective justification, addressed in *WABE and Müller*. In contrast, where the Member States in their national law add elements that are not covered by the directives, they act outside the scope of EU law. This would be the case where, for example, the national law lists more discrimination grounds or where it applies the prohibition of discrimination of grounds covered by the directives in material fields that are outside these directives. In such cases, the Member States are not acting within the field of EU law and are thus not bound by that law. However, it needs to be remembered that the Member States have obligations not only under Union law but also under international human rights law, which is often more encompassing in its approach to discrimination (see A.I above).

189 CJEU, Case C-213/04 *Ewald Burtscher v Josef Stauderer*, 1 December 2005, ECLI:EU:C:2005:731.

190 See Xenidis, R. (2020) 'Article 8. Prescriptions minimales / minimum requirements', in: Dubout, E. (ed) *Directive 2000/78 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail. Commentaire article par article*, Brussels: Bruylant, pp. 209-241. Whilst the legal basis of the two Directives, namely Article 19 TFEU, does not prescribe minimum harmonisation, Article 153(2)(b) TFEU on social law does; see CJEU, Case C-534/20 *Leistritz AG v LH*, 22 June 2022, ECLI:EU:C:2022:495, paragraph 33 and following.

191 CJEU, Joined Cases C-804/18 and C-341/19 *IX v WABE eV and MH Müller Handels GmbH v MJ*, 15 July 2021, ECLI:EU:C:2021:594 (Grand Chamber), paragraph 89.

VI THE RELATIONSHIP OF THE LEGAL CONCEPT OF INDIRECT DISCRIMINATION WITH OTHER CONCEPTS OF EU NON-DISCRIMINATION LAW

Indirect discrimination as discussed in the previous parts of this report should be distinguished from other legal concepts that are relevant in the context of Directives 2000/43 and 2000/78. The discussion begins with discrimination by association (section 1) and then turns to positive action (section 2), positive obligations (section 3) and, in relation to discrimination based on disability, reasonable accommodation (section 4). Particularly important in practice is the distinction between direct and indirect discrimination (section 5). It is notably here that the Court in its recent case law has added important elements that present a certain challenge for the application of Directives 2000/43 and 2000/78 in practice.

1 The relationship with discrimination by association

Discrimination by association concerns a different element of the analysis of discrimination than do direct and indirect discrimination, namely the *person* affected by discrimination rather than the discrimination ground.

In the context of Directives 2000/43 and 2000/78, discrimination by association was at issue in the *Coleman* case. In this case, the national court wished to learn from the Court of Justice whether the term 'discrimination based on disability' means that the disability that is allegedly at the basis of the treatment complained of must relate to the worker herself (Coleman is an employment case concerning a female worker). In other words: whether the worker herself must be disabled, or whether it is sufficient that the worker suffers a disadvantage as a consequence of the disability of her son for whom she cares, i.e. because she is associated with a person with a disability.[192] The Court found that, in view of the effectiveness of the Directive, the latter must be the case.[193]

In the run-up to the *Coleman* judgment, it had been argued that a decision in favour of discrimination by association would lead to a significant rise in claims of *indirect* discrimination in the workplace.[194] This raises the question of the relationship between discrimination by association and indirect discrimination. It is submitted that the former is not linked to the latter as a matter of definition. Whilst indirect discrimination concerns the link of a particular action with a particular discrimination ground, discrimination by association concerns the link with the person who complains about discrimination. Discrimination provisions typically contain a number of elements, including, among others, the ground for equal treatment or non-discrimination, the persons protected by the provision and the persons obliged by the provision. If used in a very broad sense (which does not correspond to the present common use in EU law), the term 'indirect' can be applied in various contexts. For example, it might be said that in the case of instructions to discriminate, the person obliged (who gives the instructions) indirectly discriminates against another person. This is explicitly called a form of discrimination under EU law, though rightly without using the label 'indirect', which would only cause confusion. Similarly, it might be said that in the case of discrimination by association, the damage occurs indirectly.

However, it should be clear that discrimination by association with a person with a particular characteristic (e.g. sexual orientation, ethnic origin, disability) concerns an issue that is different from the indirect relation of the concept of indirect discrimination with a discrimination ground. Indeed, as Advocate General (AG)

192 Compare also the earlier case of *Drake*: CJEU, Case 150/85 *Jacqueline Drake v Chief Adjudication Officer,* 24 June 1986*,* ECLI:EU:C:1986:257. In this case, the Court of Justice found that a social security benefit paid to a person caring for a disabled person forms part of a statutory scheme providing protection against invalidity, which is covered by Article 3(1)(a) of Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ 1979 L 6/24. In *Coleman*, the Court did not refer to this decision.

193 CJEU, Case C-303/06 *S. Coleman v Attridge Law and Steve Law*, 17 July 2008, ECLI:EU:C:2008:415 (Grand Chamber), paragraph 51.

194 'EU court gives boost to indirect disability rights', *EUobserver* of 1 February 2008.

Poiares Maduro points out in his opinion on the *Coleman* case,[195] the issue for the Court in this case was 'whether direct discrimination by association is prohibited by the Directive'. Similarly, the Court described the national court's question as asking 'in essence, whether Directive 2000/78 [...] must be interpreted as prohibiting direct discrimination based on disability only in respect of an employee who is himself disabled, or whether the principle of equal treatment and the prohibition of direct discrimination apply equally to an employee who is not himself disabled but who, as in the present case, is treated less favourably by reason of the disability of his child, for whom he is the primary provider of the care required by virtue of the child's condition'.[196]

More recently, the Court relied on the *Coleman* decision in order to emphasise more broadly that, depending on the circumstances, it is not only persons with a particular characteristic who may complain about discrimination. In *Nikolova*, the Court explained that Directive 2000/78 'applies not to a particular category of person but by reference to the grounds mentioned in Article 1 thereof, so that that principle is intended to benefit also persons who, although not themselves a member of the race or ethnic group concerned, nevertheless suffer less favourable treatment or a particular disadvantage on one of those grounds'.[197] With respect to the case at hand, the Court noted that 'while accepting that, as Ms Nikolova asserts before the Court, she is not of Roma origin, the fact remains that it is indeed Roma origin, in this instance that of most of the other inhabitants of the district in which she carries on her business, which constitutes the factor on the basis of which she considers that she has suffered less favourable treatment or a particular disadvantage'.[198] As noted in comments on the judgment,[199] the Court through this decision extended the concept of discrimination by association to cases of indirect discrimination (although the Court itself does not use the former term).

2 The relationship with positive action

Directives 2000/43 and 2000/78 both contain provisions on positive action. Articles 5 and 7(1), respectively, provide that, with a view to ensuring full equality in practice, the principle of equal treatment must not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to one of the discrimination grounds mentioned in the Directives. Specifically with regard to persons with a disability, Article 7(2) of Directive 2000/78 provides that 'the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.'

The concepts of positive action and indirect discrimination share a focus on substance rather than form, though in different contexts. In the case of indirect discrimination, the substantive element lies in the focus on the effect of a measure, rather than on its outward appearance. Similarly, positive action is based on the recognition that formally equal treatment (i.e. applying the same rule for all) may lead to an unequal outcome, and that therefore preferential treatment may be needed.

There are other links between the concepts. Thus, positive action measures may be based on requirements that are formulated in a neutral manner but in fact are not neutral. For example, positive action measures may lay particular stress on qualifications that are more easily present in the disadvantaged group (e.g.

195 CJEU, Case C-303/06 *S. Coleman v Attridge Law and Steve Law*, 17 July 2008, ECLI:EU:C:2008:415 (Grand Chamber), paragraph 20.
196 CJEU, Case C-303/06 *S. Coleman v Attridge Law and Steve Law*, 17 July 2008, ECLI:EU:C:2008:415 (Grand Chamber), paragraph 33.
197 CJEU, Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia (third parties: Anelia Nikolova, Darzhavna Komisia za energiyno i vodno regulirane)*, 16 July 2015, ECLI:EU:C:2015:480 (Grand Chamber), paragraph 56.
198 CJEU, Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia (third parties: Anelia Nikolova, Darzhavna Komisia za energiyno i vodno regulirane)*, 16 July 2015, ECLI:EU:C:2015:480 (Grand Chamber), paragraph 59.
199 E.g. McCrudden, C. (2016) 'The New Architecture of EU Equality Law after CHEZ: Did the Court of Justice reconceptualise direct and indirect discrimination?', *European Equality Law Review*, 2016/1, p. 7; Henrard, K. (2019) 'The Effective Protection against Discrimination and the Burden of Proof. Evaluating the CJEU's Guidance Through the Lens of Race', in: Belavusau, U., Henrard, K. (eds) (2019) *EU Anti-Discrimination Law Beyond Gender*, Oxford: Hart Publishing, p. 100.

capabilities and experience that have been acquired by carrying out family work;[200]). Where it does not meet the legal conditions for positive action (which include in particular proportionality), the measure intended as positive action in favour of one group will instead amount to indirect discrimination against the other (or another) group. What is more, a measure intended as positive action may be construed in such a manner that it amounts to (direct or indirect) discrimination against the very group that it is supposed to promote.

There is also an important difference between positive action and indirect discrimination: EU law obliges the Member States to prohibit indirect discrimination and to deal with cases where such discrimination is alleged, but it does not oblige the Member States to adopt positive action. Rather, under the present EU law this is a mere possibility. Even so, De Vos[201] notes that to the extent that EU law prohibits unjustifiable indirect discrimination, it effectively demands the avoidance of such discrimination through positive anticipation or accommodation of group differences. From this, De Vos concludes that a limited duty of preventive positive action is implicit in the prohibition of indirect discrimination. Similarly, Lippert-Rasmussen[202] notes that positive action counteracts the effects of indirect discrimination.

It should be added that, whilst the CJEU has long seen positive action as an exception to the prohibition of (both direct and indirect) discrimination (see De Vos),[203] its decision in the *Milkova* case appears to point in a new direction in this respect. The case concerned the dismissal of a worker with a disability due to the decision to abolish her post. Ms Milkova's employer was an agency that had a structure that allowed for posts to be occupied both by civil servants, such as Ms Milkova, and employees. The national legislation conferred specific advance protection in the event of dismissal to employees with a disability (namely through the requirement of an authorisation of the dismissal), without conferring this protection on civil servants with the same disabilities. Ms Milkova's case raised the question of whether this difference amounts to discrimination based on disability. In that respect, the Court found that the criterion at issue, namely the nature of the employment relationship, leads neither to direct nor to indirect discrimination. Even so, the Court found that a national rule of the type in question is covered by the positive action provision of Article 7(2) of Directive 2000/78. This would appear to indicate that the Court no longer insists on positive action being an exception but rather an aspect of equality and non-discrimination in its own right.

3 The relationship with positive obligations

The fact that, under EU law, Member States are not obliged to adopt positive action measures leads to the issue of positive obligations in a more general sense. It has been argued that positive duties (such as for instance the obligation to create a flexible and motivated workforce as part of a company's personnel policy) are the most appropriate way to advance equality and to fight discrimination, including indirect discrimination.[204]

The preambles to Directives 2000/43 and 2000/78 mention 'the aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination' (recitals 14 and 3, respectively). Also, in Directive 2000/78 the duty to provide reasonable accommodation for people with disabilities (Article 5) is a specific positive obligation of employers (see section 5, below). However, otherwise the Directives focus on the obligation to refrain from discrimination, rather than on obliging the Member States to actively promote equality.

200 CJEU, Case C-158/97 *Georg Badeck and Others*, 28 March 2000, ECLI:EU:C:2000:163, paragraph 32.
201 De Vos, M. (2020) 'The European Court of Justice and the march towards substantive equality in European Union anti-discrimination law', p. 71.
202 Lippert-Rasmussen, K. (2018) 'Indirect Discrimination, Affirmative Action and Relational Egalitarianism', in: Collins, H., Khaitan, T. (eds), *Foundations of Indirect Discrimination Law*, Oxford: Hart Publishing, p. 174.
203 Lippert-Rasmussen, K. (2018), p. 74 and following.
204 Fredman, S. (2003) 'The Age of Equality', in: Fredman, S., Spencer, S. (eds) *Age as an Equality Issue*, Oxford: Hart Publishing, p. 63.

Even so, the Court's more recent case law does mention certain obligations of the Member States. For example, the Court held that where an employer wishes to pursue a policy of neutrality in dealing with its customers, and where an employee in that situation insists on wearing religious clothing, the employer is obliged to offer her a post not involving any visual contact with the customers, where this is possible taking into account the inherent constraints to which the undertaking is subject and without the undertaking being required to take on an additional burden, rather than dismissing the employee.[205] Though circumscribed in a rather narrow manner, this amounts to a positive obligation on the side of the employer.

Finally, it should not be forgotten that the Member States are bound not only by EU law, but also by the international human rights conventions to which they are signatories. As was mentioned earlier, some of these conventions oblige the States Parties to actively take measures in order to change society. It is in this context that the concept of indirect discrimination has a role to play: by exposing the causes underlying indirect discrimination, it may help the states to identify areas where transformative equality is necessary.

4 The relationship with reasonable accommodation

As far as disability is concerned, EU law actively demands special treatment in the context of employment. Article 5 of Directive 2000/78 provides that, in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, 'employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.' It should be noted that the employer's obligation is related to the specific situation of a particular person and thus concerns a specific right of that individual worker, rather than an unspecified right to comparatively equal treatment of a group of persons.[206]

Since the previous version of this report, the CJEU has handed down a number of decisions on the reasonable accommodation requirement. In *Ring and Skouboe Werge,*[207] the Court explained that the concept of reasonable accommodation under Article 5 of Directive 2000/78 must be understood as referring to the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers. This may include not only material but also organisational measures, even in relation to working time. The preamble to Directive 2000/78 lists examples in a non-exhaustive list. The limit, as also stated in the preamble, is that the Directive does not require the recruitment, promotion or maintenance in employment of a person who is not competent, capable and available to perform the essential functions of the post concerned. Further, accommodation is 'reasonable' where it does not constitute a disproportionate burden on the employer. In a concrete case, the financial and other costs of the measure, the scale and financial resources of the undertaking, and the possibility of obtaining public funding or other assistance must be taken into account. In the *XXXX* case,[208] the Court held that the concept of 'reasonable accommodation' requires that a worker, including someone undertaking a traineeship following his or her recruitment, who, owing to his or her disability, has been declared incapable of performing the essential functions of the post that he or she occupies, be assigned to another position for which he or she has the necessary competence, capability and availability, unless that measure imposes a disproportionate burden on the employer.

205 CJEU, Case C-157/15 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, 14 March 2017, ECLI:EU:C:2017:203, paragraph 43.

206 See on this, Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation, COM(1999) 565 final, p. 9, which refers to 'individuals'. Even more explicitly, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426 final, p. 9 (equal treatment of persons with disabilities).

207 CJEU, Joined Cases C-335/11 and C-337/11 *HK Danmark, acting on behalf of Jette Ring, v Dansk almennyttigt Boligselskab (C-335/11), and HK Danmark, acting on behalf of Lone Skouboe Werge (C337/11),* 11 April 2013, ECLI:EU:C:2013:222, paragraph 54 and following.

208 CJEU, Case C-485/20 *XXXX v HR Rail SA, 10 February 2022,* ECLI:EU:C:2022:85, paragraph 49.

The obligation of the employer to provide reasonable accommodation can be seen as a specific expression of the general principle of equality, according to which persons in non-comparable situations must be treated differently.[209] Indeed, as was already noted, the definition of discrimination under Article 2 of the UN Convention on the Rights of Persons with Disabilities (CRPD) specifically includes 'denial of reasonable accommodation'. Further, the Commission's Proposal for a broader equal treatment directive (intended to enlarge the protection against discrimination based on religion or belief, disability, age and sexual orientation), in Article 2(5) explicitly states that denial of reasonable accommodation 'shall be deemed to be discrimination within the meaning of paragraph 1'.[210] However, the proposed directive has not been adopted so far.

In contrast, Directive 2000/78 does not explicitly call the denial of reasonable accommodation a form of discrimination. However, in this context it is interesting to note the Court's case law on Article 2(2)(b)(ii). This provision links indirect discrimination to reasonable accommodation: a presumption of indirect discrimination can be rebutted not only by showing that there is an objective justification but also by pointing to the obligation under national law of 'the employer or any person or organisation to whom this Directive applies [...] to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice'. In the *DW* indirect discrimination case,[211] the Court stated that the national court faced with a concrete case will have to determine whether the measures taken by the employer in terms of reasonable accommodation were sufficient in this context. If that was not so, then the disadvantageous treatment (dismissal in the *DW* case) indeed amounts to indirect discrimination. In contrast, if the accommodation measures taken were sufficient, there is no such discrimination.[212]

In academic writing, it has been said that the idea behind Article 2(2)(b)(ii) of Directive 2000/78 is that many obstacles that arise through indirect discrimination based on disability can be removed by reasonable accommodation.[213] In that sense, Article 2(2)(b)(ii) reinforces the duty to provide reasonable accommodation. It helps the victims of the alleged indirect discrimination to obtain reasonable accommodation, whilst giving the employer a certain degree of flexibility. For that reason, it has been said to create a win-win situation.[214] Some writers appear to argue in favour of a broader link. For example, Relaño Pastor writes: 'One aspect of indirect discrimination is the question of whether the employer has a duty to accommodate religious beliefs'.[215] In this author's view, the failure to accommodate a request for different treatment by religious employees may amount to indirect discrimination, unless the refusal can be justified. However, it should be noted that this leads to a broader concept of reasonable accommodation than that which applies in the context of disability. There, it relates to specific measures in *individual* cases, rather than to the treatment of groups as a whole.

AG Poiares Maduro went even further, arguing that the prohibition of indirect discrimination 'operates as an inclusionary mechanism (by obliging employers to take into account and accommodate the needs of individuals with certain characteristics).'[216] However, this is true only to a certain extent, for example where an indirect discrimination case concerns working hours or working circumstances for which there is no objective justification and which, therefore, have to be changed for the good of the employee. In other

209 Gijzen, M. (2006) *Selected Issues in Equal Treatment Law: A multi-layered comparison of European, English and Dutch law*, Antwerp/Oxford: Intersentia, p. 396.
210 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426 final.
211 CJEU, Case C-397/18 *DW v Nobel Plastiques Ibérica SA,* 11 September 2019, ECLI:EU:C:2019:703.
212 CJEU, Case C-397/18 *DW v Nobel Plastiques Ibérica SA,* 11 September 2019, ECLI:EU:C:2019:703, paragraph 63 and following.
213 Quinn, G. (2007) 'Disability discrimination in the European Union', in: Meenan, H. (ed), *Equality Law in an Enlarged European Union. Understanding the Article 13 Directives*, Cambridge: Cambridge University Press, p. 261.
214 Whittle, R. (2002) 'The Framework Directive for equal treatment in employment and occupation: an analysis from a disability rights perspective', *European Law Review*, p. 311.
215 Relaño Pastor, E. (2019) 'Religious Discrimination in the Workplace. *Achbita* and *Bougnaoui*', in: Belavusau, U., Henrard, K. (eds) (2019) *EU Anti-Discrimination Law Beyond Gender*, Oxford: Hart Publishing, p. 199.
216 AG Poiares Maduro in CJEU, Case C-303/06 *S. Coleman v Attridge Law and Steve Law*, 17 July 2008, ECLI:EU:C:2008:415 (Grand Chamber), paragraph 19.

cases, there is no such effect. For example, in pay cases a finding of indirect discrimination leads simply to the right to the same pay. Conversely, there is no issue of accommodation in such a case. Also, a finding of indirect discrimination does not in itself tackle the root causes of a given problem. In such cases, therefore, the prohibition of indirect discrimination does not oblige the employer to take into account and accommodate the needs of individuals with certain characteristics.[217]

5 The distinction between direct and indirect discrimination

a) Introductory remarks

As Fredman[218] has shown, different legal systems draw different dividing lines between the two concepts of direct and indirect discrimination and some even seem no longer to see much use in the distinction (namely Canadian law).[219] However, the distinction does remain relevant under EU law, in particular outside the field of internal market law, where the prohibition of discrimination is not complemented by a broader prohibition of restrictions that may be used instead. This is the case for Directives 2000/43 and 2000/78.

Direct and indirect discrimination are logical counterparts. Distinguishing between them is important for practical reasons: first and as already noted, in most cases there are fewer grounds for justifying direct discrimination than indirect discrimination, since under EU law direct discrimination can only be justified on the basis of grounds stated in the law (statutory justification grounds), whilst for indirect discrimination there is the additional possibility of objective justification.[220] Henrard[221] speaks of 'radically different justification mechanisms'. Secondly, indirect discrimination may be less easy to prove, in particular where proof on the basis of statistics is concerned. Ultimately, the concept of direct discrimination provides for a higher degree of protection.

Generally speaking, in the case of direct discrimination the link with the discrimination ground is strong. In fact, the link is straightforward where the prohibited ground is expressly relied on. For example, where a person of colour is refused access to a nightclub whilst other persons are accepted or where women are paid less than men for equal work. In such cases, it is typical of direct discrimination that the entire disadvantaged group consists of persons of colour (or, in our first example, one person of colour) or women (our second example), whilst the entire group of the advantaged consists of people with other characteristics. However, there is a particular additional challenge in the context of the delimitation between direct and indirect discrimination, which is that under the Court's case law, the former can also exist where the prohibited criterion is not explicitly and obviously relied on. This will be discussed further below.

In the case of indirect discrimination, the link with the discrimination ground is comparatively weaker. As put by Henrard,[222] it 'requires additional considerations, having regard to the *effects* of the measures' (emphasis added). Most notably, there is a reliance on an 'apparently neutral' criterion. Further, as the Court stated in a case relating to the internal market, '[i]n order for a measure to be treated as being indirectly discriminatory, it is not necessary for it to have the effect of placing at an advantage all the nationals of the State in question or of placing at a disadvantage only nationals of other Member States, but not nationals of the State in question [...]'.[223] Instead, it is characteristic of indirect discrimination that the

217 See also Mulder, J. (2021) *Indirect sex discrimination in employment*, p. 100.
218 Fredman, S. (2018) 'Direct and Indirect Discrimination: Is There Still a Divide?'.
219 See in this context, e.g. Yu, A. (2019) 'Direct and indirect discrimination: a distinction with a difference', *Western Journal of Legal Studies* 9 (2019) 2, pp. 1-21, who argues in favour of keeping the distinction.
220 E.g. CJEU, Case C-267/12 *Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, 12 December 2013, ECLI:EU:C:2013:823, paragraph 45.
221 Henrard, K. (2019) 'The Effective Protection against Discrimination and the Burden of Proof. Evaluating the CJEU's Guidance Through the Lens of Race', p. 107 (see also p. 102).
222 Henrard, K. (2019), p. 107.
223 CJEU, Case C-514/12 *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs GmbH v Land Salzburg*, 5 December 2013, ECLI:EU:C:2013:799, paragraph 27.

disadvantaged group does not exclusively, but only predominantly, consist of persons who are protected by the discrimination ground in question. Accordingly, they are 'merely' disproportionately represented in the disadvantaged group. This may be illustrated by using the classic example of part-time work in the context of sex discrimination. Where part-time workers are treated less favourably than full-time workers, this will often disproportionately affect women. This is due to the fact that in many countries of the EU, a traditional division of roles in the family persists according to which it is predominantly women who perform domestic and care work, and which makes it difficult for women to engage in full-time work outside the home. At the same time, there is nothing to prevent men from working part time, and some men (although typically considerably fewer than women) indeed do so. Accordingly, any treatment of part-time workers that is worse than that of full-time workers will affect not only women, but also those men. The same will apply, *mutatis mutandis,* in cases of indirect discrimination based on grounds that are protected under Directives 2000/43 and 2000/78.

b) Evolution of the Court's case law: overview

In original Community law (as it was then), the perception was quite simply that direct discrimination concerned cases where a discrimination ground is expressly used, while indirect discrimination related to cases that involve a formally neutral ground which, however, has a particular detrimental effect on a protected group.[224]

At a time when the relevant Community law did not yet contain legal definitions of direct and indirect discrimination, *Dekker*[225] raised the question of how the criterion of pregnancy should be classified in this context. The *Dekker* case involved the refusal to employ a pregnant woman because the employer could not have obtained reimbursement of the daily benefits that it would have had to pay her for the duration of her absence due to pregnancy. Apart from dealing with that specific issue, the judgment also shows how the Court at that time drew the delimitation between direct and indirect discrimination.

According to the Court, the answer to the question of whether, in a case such as *Dekker,* there is direct or indirect sex discrimination, 'depends on whether the fundamental reason for the refusal of employment is one which applies without distinction to workers of either sex or, conversely, whether it applies exclusively to one sex'.[226] The Court held that 'only women can be refused employment based on pregnancy and such a refusal therefore constitutes direct discrimination based on sex and that a refusal of employment on account of the financial consequences of absence due to pregnancy must be regarded as based, essentially, on the fact of pregnancy'.[227] The fact that disadvantageous treatment based on pregnancy is direct sex discrimination is now explicitly stated in Article 2(2)(c) of Directive 2006/54 (Recast Directive).[228]

The Court's finding in *Dekker* contrasts favourably with early case law from certain other jurisdictions, which argued that there could be no sex discrimination due to the fact that the advantaged group of non-pregnant persons also includes women (i.e. not all women are pregnant).[229] Instead, the Court in *Dekker* put the focus on the group of those disadvantaged by the use of the criterion of pregnancy, noting that 'only women can be refused employment based on pregnancy' (although, as Mulder notes,

224 See Tobler, C. (2005) *Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*, p. 101 and following.

225 CJEU, Case C-177/88 *Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV Centrum) Plus*, 8 November 1990, ECLI:EU:C:1990:383.

226 CJEU, Case C-177/88 *Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV Centrum) Plus*, 8 November 1990, ECLI:EU:C:1990:383, paragraph 10; Interestingly, the Court in its more recent case law still uses this criterion; see, e.g. CJEU, Case C-405/20 *EB, JS, DP gegen Versicherungsanstalt öffentlich Bediensteter, Eisenbahnen und Bergbau (BVAEB)*, 5 May 2022, ECLI:EU:C:2022:347, paragraph 46.

227 CJEU, Case C-177/88 *Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV Centrum) Plus*, 8 November 1990, ECLI:EU:C:1990:383, paragraph 12.

228 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ 2006 L 204/23.

229 Tobler, C. (2005) *Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*, p. 46 and, in relation to *Dekker,* p. 342 and following.

matters are more complicated from a modern perspective).[230] Accordingly, the Court's test in *Dekker* for distinguishing between direct and indirect discrimination was the degree of the exclusionary effect: where those disadvantaged belong exclusively to one protected group, the concept of direct discrimination will be relevant, irrespective of the fact that those benefiting from the more advantageous treatment might also include members of that group.

Admittedly, the *Dekker* case is special as it involved a criterion – pregnancy – that is, quite obviously, not sex neutral. An important further step in the evolution of the Court's case law on the distinction between direct and indirect discrimination concerns criteria that do in fact seem neutral but that still have to be assessed in the framework of direct discrimination. In that respect, two lines of case law can be discerned. First, the main line focuses on the nature of a formally neutral criterion as being inextricably or inseparably linked to a prohibited discrimination ground: where such a criterion is being used, the correct frame of analysis will be direct (rather than indirect) discrimination. There is now a certain number of cases on this perspective. A second, in terms of numbers less prominent line, focuses on the reasons why a certain disadvantageous treatment is meted out to certain persons or group of persons: where it can be proved that these reasons were related to a prohibited discrimination ground, again the correct frame of analysis will be direct (rather than indirect) discrimination. The two lines of case law are further explained below.

c) The main line of case law: criteria inextricably or inseparably linked to a prohibited discrimination ground

According to the Court's now firmly established case law, formally neutral criteria that are, nevertheless, 'inseparably' or 'inextricably' linked to a prohibited discrimination ground must be assessed in the framework of direct, rather than indirect discrimination.

i The test as set out in the modern CJEU case law

As CJEU case law stands at the time of writing this report, the leading case on this matter is *Szpital Kliniczny*. This case involved a psychologist with a disability who worked at a hospital. It was decided to grant a monthly allowance to workers who submitted disability certificates *after* a given staff meeting. Those who had submitted their certificates *before* the meeting – a group that included the applicant – received nothing. The criterion employed was, therefore, the time when the disability certificate was submitted. It led to different treatment between different groups of persons with disabilities. The Court held that the fact that the difference in treatment was not between persons without and persons with a disability does not prevent a finding of discrimination under Directive 2000/78.[231]

Although the Court left it to the national court to judge whether the case at hand led to direct or rather to indirect discrimination based on disability, the judgment is important because of the Court's general statements about the applicability of the two concepts and the delimitation between them in cases where a formally neutral criterion is relied on. At least on this general level, the Court appears to follow the Opinion of AG Pitruzzella. Arguing that an inextricable link with the protected characteristic is regarded as an essential element of direct discrimination, the AG notes that such a link may be of an 'indirect' nature.[232] Clearly, what the AG here refers to is a criterion that is not expressly the prohibited criterion but, rather, something that is different on the formal level.

230 Mulder, J. (2021) *Indirect sex discrimination in employment*, p. 42: '[...] only people with female reproductive organs can become pregnant. Pregnancy discrimination by definition discriminates on the ground of the biological female sex, even though not all women are or ever will be pregnant and modern legislation on gender recognition makes it possible for some pregnant people to be men.'

231 CJEU, Case C-16/19 *VL v Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, 26 January 2021, ECLI:EU:C:2021:64 (Grand Chamber), paragraphs 35 and 36.

232 AG Opinion in the *Szpital Kliniczny* case, paragraph 78, footnote 27.

The Court formulates the following test for direct discrimination (emphasis added):

> '[...] where an employer treats a worker less favourably than another of his or her workers is, has been or would be treated in a comparable situation and where it is established, having regard to all the relevant circumstances of the case, that that unfavourable treatment is based on the former worker's disability, inasmuch as it is based on *a criterion which is inextricably linked to that disability*, such treatment is contrary to the prohibition of direct discrimination set out in Article 2(2)(a) of Directive 2000/78.'[233]

From this, it follows that a formally neutral criterion which, due to certain additional circumstances, is nevertheless inextricably linked to a prohibited discrimination ground, is to be regarded as being 'based on' that ground. As a consequence, the relevant framework for analysing it is that of direct discrimination. Only where that is not the case, does the analysis shift to indirect discrimination, described by the Court as relating to 'other criteria not related to the protected characteristic':[234]

> 'Regarding [...] the question whether a practice such as that at issue in the main proceedings constitutes indirect discrimination for the purposes of Article 2(2)(b) of Directive 2000/78, it is apparent from the case-law of the Court that such discrimination may stem from a measure which, albeit formulated in neutral terms, that is to say, by reference to other criteria not related to the protected characteristic, leads, however, to the result that persons possessing that characteristic are put at a particular disadvantage [...].'

In the Court's case law before *Szpital Kliniczny*, brief references to (the lack of) an 'inseparable' link had been made in *Ring and Skouboe,*[235] *Milkova,*[236] and *Ruiz Conejero.*[237] In *Szpital Kliniczny,*[238] the Court refers to the latter two in the context of the statement that 'it cannot be held that a provision or practice establishes a difference in treatment directly based on disability, for the purposes of the combined provisions of Article 1 and Article 2(2)(a) of that directive, where it is based on a criterion that is not inextricably linked to disability'.

By way of actual examples where it did accept the existence of such a link, the Court in *Szpital Kliniczny* refers to *Maruko*, *Römer*[239] and *Hay* (all relating to discrimination based on sexual orientation) as well as to *Andersen* (relating to discrimination based on age) and *Kleist* (relating to sex discrimination). Interestingly, in only two of these previous judgments did the Court explicitly mention an 'inextricable' link. Conversely, the Court in *Szpital Kliniczny* does not mention an earlier case from the field of sex equality law that is also relevant in the present context, namely *Nikoloudi*. These cases are presented in the following sections.

ii Sex equality case law: Nikoloudi *and* Kleist

Nikoloudi is a rather complex case which concerned the promotion of temporary staff to permanent staff under the rules of a collective agreement that had the force of law. Under those rules, only temporary staff who had worked full time for at least two years were eligible to become permanent staff. The case

233 CJEU, Case C-16/19 *VL v Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, 26 January 2021, ECLI:EU:C:2021:64 (Grand Chamber), paragraph 48.
234 CJEU, Case C-16/19 *VL v Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, 26 January 2021, ECLI:EU:C:2021:64 (Grand Chamber), paragraph 55.
235 CJEU, Joined Cases C-335/11 and C-337/11 *HK Danmark, acting on behalf of Jette Ring, v Dansk almennyttigt Boligselskab (C-335/11), and HK Danmark, acting on behalf of Lone Skouboe Werge (C337/11),* 11 April 2013, ECLI:EU:C:2013:222, paragraph 74.
236 CJEU, Case C-406/15 *Petya Milkova v Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen kontrol,* 9 March 2017, ECLI:EU:C:2017:198, paragraph 42.
237 CJEU, Case C-270/16 *Carlos Enrique Ruiz Conejero v Ferroser Servicios Auxiliares SA, Ministerio Fiscal*, 18 January 2018, ECLI:EU:C:2018:17, paragraph 37.
238 CJEU, Case C-16/19 *VL v Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, 26 January 2021, ECLI:EU:C:2021:64 (Grand Chamber), paragraph 44.
239 CJEU, Case C-147/08 *Jürgen Römer v Freie und Hansestadt Hamburg,* 10 May 2011, ECLI:EU:C:2011:286 (Grand Chamber).

concerned a female temporary staff member who, after having been employed part time as a cleaner, worked full time for a little less than two years and for that reason did not qualify for the promotion to permanent staff member. The national court seized with the matter asked the Court of Justice whether such a case involved indirect sex discrimination, even if the rules in question in fact had the effect of excluding female cleaners only from promotion. The reason for this effect was a provision in the General Staff Regulations, which provided that only women could be taken on as part-time cleaners. Ms Nikoloudi, the Commission and AG Stix-Hackl all argued that such a case concerns *indirect* sex discrimination. Conversely, the Court found that the exclusion of a possibility of appointment as a member of permanent staff 'by reference, ostensibly neutral as to the worker's sex, to a category of workers which, under national rules having the force of law, is composed exclusively of women constitutes *direct* discrimination based on sex'.[240] (emphasis added).

Even though the Court in *Szpital Kliniczny* does not mention *Nikoloudi* as a precursor for the doctrine of the inextricable link, it is clear that the approach used in that latter case was, precisely, that of an inextricable link to the female sex, here created through the rule according to which only women could be taken on as part-time cleaners. As a result of that rule, the disadvantaged group consisted of women only. That this was the Court's reason for declaring direct discrimination to be the relevant framework of analysis becomes abundantly clear when the Court adds that where, in spite of the rules, the part-time work force did in fact include some men, the analysis would have to be one of indirect discrimination.[241]

Farkas and O'Farrell[242] speak about 'direct discrimination based on exclusive effect' that emanates from a formally neutral rule and is characterised by the fact that the groups suffering the less favourable treatment, similarly to their comparator groups, are homogeneous. In contrast, indirect discrimination is characterised by the fact that both groups are heterogeneous, even though people with a protected characteristic are overrepresented in the group suffering the particular disadvantage and they are underrepresented in the comparator group.

A further sex equality case that is relevant in the present context, that is indeed mentioned in *Szpital Kliniczny,* is *Kleist*.[243] The case concerned rules of a collective agreement on dismissal under which employees, whose length of service with the body that employed them was 10 years or more, could be dismissed only on certain specified grounds. A special rule provided that doctors with protection from dismissal could nevertheless be dismissed when they acquired the right to draw a retirement pension under the law. At the same time, the national law provided for a different pension age for men and women. Again, the Court declared direct discrimination to be the relevant legal framework.[244]

> 'In the present instance, it is apparent from Paragraph 134(2)(2) and (4)(1) of the DO.B [the national law in question] that doctors with protection from dismissal can nevertheless be dismissed when they acquire the right to draw a retirement pension under Paragraph 253 of the ASVG. Pursuant to Paragraph 253(1) of the ASVG [the national law on pensions], men acquire that right when they have attained 65 years of age and women when they have attained 60 years of age. The effect of this is that female workers can be dismissed when they have attained 60 years of age whilst male workers cannot be dismissed until they have attained 65 years of age. Since the criterion used by such provisions is inseparable from the workers' sex, there is [...] a difference in treatment that is directly based on sex.'

240 CJEU, Case C-196/02 *Vasiliki Nikoloudi v Organismos Tilepikoinonion Ellados AE*, 10 March 2005, ECLI:EU:C:2005:141, paragraph 36.
241 CJEU, Case C-196/02 *Vasiliki Nikoloudi v Organismos Tilepikoinonion Ellados AE*, 10 March 2005, ECLI:EU:C:2005:141, paragraph 44 and following.
242 Farkas, L., O'Farrell, O. (2015) *Reversing the burden of proof: Practical dilemmas at the European and national level,* European network of legal experts in the non-discrimination field, Luxembourg: Publications Office of the European Union, p. 39.
243 CJEU, Case C-356/09 *Pensionsversicherungsanstalt v Christine Kleist,* 18 November 2010, ECLI:EU:C:2010:703.
244 CJEU, Case C-356/09 *Pensionsversicherungsanstalt v Christine Kleist,* 18 November 2010, ECLI:EU:C:2010:703, paragraphs 31 and 32.

With this approach, the Court followed the approach of AG Kokott, who wrote in her opinion on *Kleist*:[245]

> 'At first sight it appears as if the contested provision in the present case is formulated in a manner that is gender neutral: Paragraph 134(4)(1) of the DO.B enables a social security provider to retire employees who are protected from dismissal when they reach the statutory normal pensionable age. On closer scrutiny, however, it is apparent that the criterion of the normal pensionable age is inseparably linked to sex, as in Paragraph 253(1) of the ASVG the Austrian legislature lays down different retirement ages for men and women. The combined effect of Paragraph 134(4)(1) of the DO.B and Paragraph 253(1) of the ASVG is a system whereby women may be retired from the age of 60 and men from 65. Consequently, the result is that the disputed retirement rules are *directly* linked to sex, and have the effect that women can lose their jobs five years earlier than men' (paragraph 34).

Again, the disadvantaged group consists of women only. According to Mulder,[246] that is the decisive issue in this case (which implies at the same time that in this particular case, the fact that the advantaged group consisted of one group only, namely men, did not matter).

iii Age discrimination: Andersen

In *Szpital Kliniczny*, the Court referred to *Andersen* as a further example of a case involving a criterion with an inextricable link to a prohibited discrimination ground. Mr Andersen was dismissed at the age of 63, at which point he registered as a jobseeker. When he applied for a severance allowance in the context of his dismissal, he was told that, under the applicable law, an entitlement to such an allowance existed only where the employee is not entitled to an occupational old-age pension, with an exception for those who had joined the employer's pension system after attaining the age of 50. The collective agreement applicable in Mr Andersen's case tied the entitlement to an old-age pension to the minimum age of 60. In other words, in cases such as that of Mr Andersen, those who were 60 or over had no right to a severance allowance. The Court held that the provision in question was based on a criterion that is inextricably linked to the age of employees.[247] Again, the decisive element for this finding appears to be the fact that those who suffered from the criterion at issue were exclusively workers of 60 years of age and over.

An illustrative counterexample to both *Kleist* and *Andersen* is *Singh Bedi*.[248] This case concerned the right to bridging assistance, granted with the aim of ensuring a reasonable means of subsistence to workers who have lost their job until they are entitled to a retirement pension under the statutory pension scheme. The case raised the question of whether Article 2(2) of Directive 2000/78 precludes provisions in a collective agreement under which the payment of bridging assistance must cease once the worker is entitled to early payment of a retirement pension for severely disabled persons under that scheme. The Court held that this criterion was not inseparably linked to disability due to the fact that, under the law in question, not only severely disabled workers but also other groups of workers were entitled to early payment of a retirement pension. Having ruled out direct discrimination, the Court then turned to the question of whether such a case could involve indirect discrimination based on disability.[249] In other words, the decisive element for ruling out direct discrimination was the fact that the disadvantaged group did not consist only of persons with a disability.

iv Case law on sexual orientation: Maruko, Römer *and* Hay

In *Szpital Kliniczny,* the Court further refers to its case law on sexual orientation, even though there it did not use the language of an inseparable or inextricable link. The relevant cases, *Maruko, Römer* and *Hay,*

245 CJEU, Case C-356/09 *Pensionsversicherungsanstalt v Christine Kleist,* 18 November 2010, ECLI:EU:C:2010:532 (Opinion of AG Kokott).
246 Mulder, J. (2021) *Indirect sex discrimination in employment*, p. 43.
247 CJEU, Case C-99/08 *Ingeniørforeningen i Danmark, acting on behalf of Ole Andersen v Region Syddanmark,* 12 October 2010, ECLI:EU:C:2010:600 (Grand Chamber), paragraph 23.
248 CJEU, Case C-312/17 *Surjit Singh Bedi v Bundesrepublik Deutschland, Bundesrepublik Deutschland in Prozessstandschaft für das Vereinigte Königreich von Großbritannien und Nordirland,* 19 September 2018, ECLI:EU:C:2018:734.
249 CJEU, Case C-312/17 *Surjit Singh Bedi v Bundesrepublik Deutschland, Bundesrepublik Deutschland in Prozessstandschaft für das Vereinigte Königreich von Großbritannien und Nordirland,* ECLI:EU:C:2018:734, 19 September 2018, paragraph 49 and following.

all concern benefits tied to marital status – which, according to the Court, in the circumstances, 'could not be regarded as an apparently neutral criterion' within the meaning of the legal definition of indirect discrimination.[250]

In *Maruko,* the Court held that reserving the entitlement to a widower's pension to surviving married partners, in a situation where marriage is open only to heterosexual couples, would amount to direct discrimination based on sexual orientation. Mr Maruko was refused a widower's pension based on the wording of the collective agreement that applied to his deceased male partner. Under the rule applicable at the time, '[t]he spouse of the insured man or retired man, if the marriage subsists on the day of the latter's death, shall be entitled to a widow's pension'. It is worth noting that in the original German language the word "spouse" in this rule indicated a female person *(Ehefrau*; conversely, it indicated a male person in the parallel rule on widower's pensions: *Ehemann*). It is therefore clear from the very language of this rule that the person entitled to a pension had to be an opposite-sex person who had been married to the deceased employee. This excluded male, same-sex partners in two ways: first, quite simply because they were not women, and, secondly, because under the German law in force at the time they were not able to marry their same-sex partners.

In the *Maruko* case, the applicant, the European Commission and AG Ruiz-Jarabo Colomer all argued that the decisive criterion was the requirement of marriage, and that, given that homosexual couples at the time could not marry in Germany but instead could merely enter into a registered partnership (which was reserved to same-sex couples), the case involved *indirect* discrimination based on sexual orientation. The Court, however, took a different approach. It stated that under the provisions in question surviving life partners are treated less favourably than surviving spouses and then continued as follows: 'If the referring court decides that surviving spouses and surviving life partners are in a comparable situation so far as concerns that survivor's benefit, legislation such as that at issue in the main proceedings must, as a consequence, be considered to constitute direct discrimination based on sexual orientation'.[251]

The Court in *Maruko* did not elaborate on the reasons for this approach and neither did it in *Römer*, another German case, which concerned the calculation of a supplementary retirement pension in view of the employee's registered partnership with his same-sex partner. Mr Römer argued that he should be entitled to be treated in the same manner as a married, not permanently separated, pensioner. Again, the Court declared the concept of direct discrimination to be relevant.

The legal background to the subsequent case of *Hay* was French law, which at that time allowed, on the one hand, for opposite sex marriage and, on the other hand, for a civil partnership that was open to both same-sex and opposite-sex partners (known as PACS, *pacte civil de solidarité*). At issue were rules of a collective agreement that reserved certain benefits in respect of pay (namely a bonus) and of working conditions (namely special leave) to employees who marry. The Court stated that in this respect persons of the same sex who cannot enter into marriage and, instead, conclude a PACS are in a situation that is comparable to that of couples who marry.[252] Again, the Court found the concept of direct discrimination to be relevant.[253]

250 CJEU, Case C-16/19 *VL v Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, 26 January 2021, ECLI:EU:C:2021:64 (Grand Chamber), paragraph 45.

251 CJEU, Case C-267/06 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*, 1 April 2008, ECLI:EU:C:2008:179 (Grand Chamber), paragraph 72; the national court had indicated that the required comparability did indeed exist; Maruko, paragraph 69.

252 In academic writing, it has been argued that this point is particularly important given that the PACS grants a less strong legal position than the German registered partnership at issue in *Maruko* and *Römer*; see Valenti, V. (2015) 'Principle of non-discrimination on the grounds of sexual orientation and same-sex marriage: a comparison between United States and European case law', in: Pineschi, L. (ed) *General Principles of Law – The Role of the Judiciary*, Cham: Springer, p. 227 and following.

253 CJEU, Case C-267/12 *Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, 12 December 2013, ECLI:EU:C:2013:823, paragraph 42 and following.

> 'Articles 20 and 34 of [the relevant] national collective agreement grant paid leave and a bonus to employees who enter into marriage. Since marriage is not, according to the information provided by the referring court, accessible to persons of the same sex, they cannot receive those benefits. The fact that the PACS, unlike the registered life partnership at issue in the cases which gave rise to the judgments in *Maruko* and *Römer*, is not restricted only to homosexual couples is irrelevant and, in particular, does not change the nature of the discrimination against homosexual couples who, unlike heterosexual couples, could not, on the date of the facts in the main proceedings, legally enter into marriage. The difference in treatment based on the employees' marital status and not expressly on their sexual orientation is still direct discrimination because only persons of different sexes may marry and homosexual employees are therefore unable to meet the condition required for obtaining the benefit claimed.'

It is clear that in these cases there was indeed an inextricable link between marital status and sex: given that only opposite-sex couples were able to marry under the law then in force, same-sex couples would always be excluded from benefits tied to marriage.

What is perhaps less clear is whether it can be said that the disadvantaged group consists of homosexuals only, in the same manner as discussed above in the context of other cases. Commenting on the Court's case law on sexual orientation and benefits tied to marital status under Directive 2000/78, De Vos argues: 'When marriage is inseparable from sexual orientation, it becomes equated with sexual orientation for the purpose of non-discrimination, thereby mobilizing formal equality in the very substantive debate on marriage equality. In essence, the prohibition of direct discrimination under EU law has expanded to include treatment that, while not formally differentiating based on a protected characteristic, is substantively identical because it *affects only* the protected group or a subgroup' (emphasis added).[254] Martin puts it slightly differently: according to him, the formally neutral criterion in practice or under the law *excludes* a protected group.[255]

The difficulty here lies in the fact that rules such as those at issue in *Maruko*, *Römer* and *Hay* disadvantage not only homosexual persons but also non-married heterosexual persons. However, in that respect the comparability requirement under Article 2(2)(a) of Directive 2000/78 needs to be remembered: since only partners in a registered partnership are comparable to married partners, only they can be relevant for the direct discrimination analysis. For cases such as *Maruko* and *Römer* this means that, indeed, the group of those excluded are homogeneous in that it consists only of homosexual persons. As for a case such as *Hay*, the Court declared the fact that the PACS partners who were refused the marriage benefit also included heterosexual partners to be irrelevant, as it was only the homosexual employees who were unable to marry. In other words, here the Court put the emphasis on the complete exclusionary effect of the law that set homosexual PACS employees apart from heterosexual PACS employees. Indeed, when discussing comparability in the *Hay* case, the Court did not refer to employees who enter into a PACS in general, but rather compared persons who enter into marriage specifically with 'persons who, being unable to marry a person of their own sex, enter into a PACS'.[256]

Tryfonidou[257] concludes from this that 'for a finding of direct discrimination it is not necessary that the status which is treated worse (here the PACS) is only open to same-sex couples. Rather, what is required is simply that the status through which additional rights or benefits are granted (in this case, marriage) is not open to same-sex couples'. The author of this report agrees: whilst in a case like *Hay* the disadvantaged group who are in a comparable situation does not consist exclusively of homosexual

254 De Vos, M. (2020) 'The European Court of Justice and the march towards substantive equality in European Union anti-discrimination law', p. 68.
255 Martin, D. (2018) 'Cachez ce voile que je ne saurais voir!', *Droit social*, p. 315.
256 CJEU, Case C-267/12 *Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, 12 December 2013, ECLI:EU:C:2013:823, paragraph 35.
257 Tryfonidou, A. 'The Impact of the Framework Equality Directive on the Protection of LGB Persons and Same-Sex Couples from Discrimination under EU Law', in: Belavusau, U., Henrard, K. (eds) (2019) *EU Anti-Discrimination Law Beyond Gender*, Oxford: Hart Publishing, p. 240.

persons, it is only they who were legally barred from becoming part of the group that received the more advantageous treatment. It would therefore seem that here the criterion is that of an effect that is *completely* exclusionary, in that the disadvantaged group of persons is unable to meet the requirement in question.

d) A second line of case law: discrimination 'for reasons relating to' a prohibited discrimination ground

There is a second, and less prominent line of case law according to which the use of a formally neutral criterion can, nevertheless, lead to direct discrimination. It appeared in the *Nikolova* case in the context of alleged discrimination on grounds of ethnic origin. The case concerned disadvantageous measures taken by an electricity company vis-à-vis its consumers in a city district predominantly inhabited by Roma people. A shop owner from the district (although not herself of Roma origin) complained that she was unable to check her electricity meter for the purpose of monitoring her consumption and making sure that the bills sent to her, which in her view overcharged her, were correct.

The Court begins 'by pointing out that the mere fact that the district at issue in the main proceedings is also lived in by inhabitants who are not of Roma origin does not rule out that such a practice was imposed in view of the Roma ethnic origin shared by most of that district's inhabitants'. It continues by stating that 'it is sufficient, in order for there to be direct discrimination within the meaning of Article 2(2)(a) of Directive 2000/43, that that ethnic origin determined the decision to impose the treatment, without prejudice to the exceptions'.[258] (emphasis added). The Court summarises this part of its judgment in the following manner:

> 'In the light of all the foregoing, the answer to the second, third and fourth questions is that Article 2(2)(a) of Directive 2000/43 must be interpreted as meaning that a measure such as the practice at issue constitutes direct discrimination within the meaning of that provision if that measure proves to have been introduced and/or maintained for reasons relating to the ethnic origin common to most of the inhabitants of the district concerned, a matter which is for the referring court to determine by taking account of all the relevant circumstances of the case and of the rules relating to the reversal of the burden of proof that are envisaged in Article 8(1) of the directive.'[259]

Further on in the same judgment, the Court contrasts direct and indirect discrimination in the following manner:

> '[I]t should be recalled that, as is clear from the answer given to the second, third and fourth questions, if it is apparent that a measure which gives rise to a difference in treatment has been *introduced for reasons relating to racial or ethnic origin*, that measure must be classified as 'direct discrimination' within the meaning of Article 2(2)(a) of Directive 2000/43.
> By contrast, indirect discrimination on the grounds of racial or ethnic origin does not require the measure at issue to be based on reasons of that type. As is apparent from the case-law recalled in paragraph 94 of the present judgment, in order for a measure to be capable of falling within Article 2(2)(b) of Directive 2000/43, it is sufficient that, although using neutral criteria not based on the protected characteristic, it has the *effect* of placing particularly persons possessing that characteristic at a disadvantage.'[260] (emphasis added)

258 CJEU, Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia (third parties: Anelia Nikolova, Darzhavna Komisia za energiyno i vodno regulirane)*, 16 July 2015, ECLI:EU:C:2015:480 (Grand Chamber), paragraph 76.
259 CJEU, Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia (third parties: Anelia Nikolova, Darzhavna Komisia za energiyno i vodno regulirane)*, 16 July 2015, ECLI:EU:C:2015:480 (Grand Chamber), paragraph 91.
260 CJEU, Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia (third parties: Anelia Nikolova, Darzhavna Komisia za energiyno i vodno regulirane)*, 16 July 2015, ECLI:EU:C:2015:480 (Grand Chamber), paragraphs 95 and 96.

Here, the Court puts the emphasis on the *reasons* for imposing the disadvantageous treatment. There will be direct discrimination in a case involving a formally neutral criterion (here, a particular city district) if this criterion was employed in view of a certain ethnic origin ('imposed in view of the Roma ethnic origin', 'that ethnic origin determined the decision to impose the treatment', 'introduced for reasons relating to racial or ethnic origin'). Only where that is not the case, will the analysis have to shift to indirect discrimination. As Benedi Lahuerta notes, on a practical level, establishing direct or indirect discrimination in the present context will essentially be a matter of proof (on this issue, see further D.III below).[261] As Fredman notes, the same facts may lead to a finding of direct or of indirect discrimination.[262]

Academic appreciations of the reason-based approach taken by the CJEU differ. For example, Cahn has argued that the focus on the reasons for introducing discrimination represents a potential flaw in the Court's judgment, since in this manner, the Court 'has come perilously close to allowing the return of intent back into European anti-discrimination law'.[263] The author notes that it is one of the salient features of European anti-discrimination law – both of the EU and the Council of Europe – and one of the elements which makes it currently clearly superior in quality to anti-discrimination law in the USA[264] that intent is explicitly not a matter for evaluation. According to Martin,[265] such cases are really indirect discrimination cases that are labelled differently by the Court, even though they are not covered by the legal definition of direct discrimination. In contrast, according to authors such as Ambrus, Busstra and Henrard,[266] it is important to recognise what is sometimes termed 'covert direct discrimination'.

The argument of direct discrimination (here, based on religion) was also made in subsequent cases regarding the Islamic headscarf. For example, the employee in the *WABE* case argued that, despite the general character of her employer's rule prohibiting the wearing of visible political, philosophical or religious signs, that rule in fact directly targeted the wearing of the Islamic headscarf and therefore constituted direct discrimination.[267] The Court, however, did not address this issue but instead emphasised that where a general rule is applied in an undifferentiated way, there can be no direct discrimination.[268] Howard[269] criticises that the Court could have provided more protection from discrimination by considering the argument of direct, rather than indirect discrimination, because the employers in *WABE and Müller* were private employers and because the wishes of customers could well have been based on stereotypes about, and prejudices against, Muslims (i.e. the reason for the measure was, in fact, related to the Muslim faith). If this was the case, then in Howard's view direct discrimination should have been the relevant concept[270] A similar view was expressed by Relaño Pastor in relation to *Achbita*.

Whilst the Court did not refer to the *Nikolova* approach in *WABE and Müller*, it also did not retract from it. Accordingly, direct discrimination may still be argued before a national court on the basis that a formally neutral criterion was chosen for reasons relating to a prohibited discrimination ground. The national court will then have to decide on whether this has been proven to the required standard.

261 Benedi Lahuerta, S. (2016) 'Ethnic discrimination, discrimination by association and the Roma community: *CHEZ*', *Common Market Law Review* 53, pp. 807 and 808.
262 Fredman, S. (2018) 'Direct and Indirect Discrimination: Is There Still a Divide?', p. 53.
263 Cahn, C. (2016) 'Court of Justice of the EU Rules Collective and Inaccessible Electrical Metres Discriminate against Roma: CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia (C83/14)', *European Journal of Migration and Law* 18, pp. 123 and 124.
264 On this issue, see Fredman, S. (2018) 'Direct and Indirect Discrimination: Is There Still a Divide?'.
265 Martin, D. (2018) 'Cachez ce voile que je ne saurais voir!', *Droit social*, p. 315.
266 E.g. Ambrus M., Busstra, M., Henrard, K. (2010) 'The Racial Equality Directive and effective protection against discrimination: mismatches between the substantive law and its application', *Erasmus Law Review* 3, p. 171. Note that the term 'covert direct discrimination' is used in different contexts and with different meanings in academic writing.
267 CJEU, Joined Cases C-804/18 and C-341/19 *IX v WABE eV and MH Müller Handels GmbH v MJ*, 15 July 2021, ECLI:EU:C:2021:594 (Grand Chamber), paragraph 30.
268 CJEU, Joined Cases C-804/18 and C-341/19 *IX v WABE eV and MH Müller Handels GmbH v MJ*, 15 July 2021, ECLI:EU:C:2021:594 (Grand Chamber), paragraph 52.
269 Howard, E. (2022) 'Headscarves and the CJEU: Protecting fundamental rights and pandering to prejudice, the CJEU does both', *Maastricht Journal of European and Comparative Law* 29, p. 262.
270 Relaño Pastor, E. (2019) 'Religious Discrimination in the Workplace. *Achbita* and *Bougnaoui*', p. 193.

e) Overall finding

The following is an attempt to synthesise the Court's increasingly complex case law on the delimitation of direct and indirect discrimination as relevant to Directives 2000/43 and 2000/78 at the time of writing.

Direct discrimination:

- The concept of direct discrimination will in any case be relevant where *express use* is made of a prohibited discrimination ground. This is, indeed, the easiest category in order for the purposes of identifying the direct nature of the discrimination.[271] In the Court's modern case law, the very large majority of direct discrimination cases concern differentiations on the basis of age.
- Further, the concept of direct discrimination will be relevant if it can be proven that a criterion, even if formally neutral, has been *chosen for reasons related to a prohibited discrimination ground* (*Nikolova*).
- Moreover, the concept of direct discrimination will be relevant where the criterion used is *inseparably or inextricably linked* to a prohibited discrimination (as confirmed in particular in *Szpital Kliniczny*). It seems that the Court in this context puts the focus on the exclusionary effect of the criterion in question: either all those disadvantaged by the criterion belong to the same protected group (*Nikoloudi, Kleist, Andersen, Maruko, Römer*) or that group includes persons who are completely excluded in the sense that they will not be able to meet the criterion in question (*Hay*).

Indirect discrimination:

For any other criteria that are formally, ostensibly or at first glance neutral, the concept of indirect discrimination will be relevant. In such cases, both the advantaged and the disadvantaged groups will be heterogeneous.

Need for distinction

Though closely related, direct and indirect discrimination are different legal concepts, which has consequences for their application in practice (i.e. proof, justification etc.).

Distinction on the level of the nature of the measure

The nature of the allegedly discriminatory measure is determined by its form and substance.

Form	Substance
Concerns the outward appearence of the measure, which can be: • either explicitly discriminatory; • or apparently neutral.	Concerns the actual link of the differentiation criterion with the discrimination ground and the effect of the measure in terms of the disadvantage caused.

Two obvious constellations leading to **direct** discrimination:
- Criterion used corresponds explicitly to a discrimination ground; e.g. *Prigge* (2001), concerning age;
- Criterion used is by biology linked to a discrimination ground; *Dekker* (1990), concerning pregnancy (see now Art. 2(2)(c) of Directive 2006/54).

271 According to Martin there is a fourth type of direct discrimination which concerns *equal* treatment of persons in relevantly *different* situations; Martin, D. (2018) 'Cachez ce voile que je ne saurais voir!', *Droit social*, p. 315.

Examples of other, less obvious constellations involving criteria that do not expressly correspond to a discrimination ground:

	Direct discrimination	Indirect discrimination
Criterion used is **inextricably linked** to a discrimination ground; it either (1) excludes only persons from one group or (2) comparable persons from different groups but one of these altogether because it can never fulfil the criterion	Principle explained in *Szpital Kliniczny* (2021); e.g. (1) *Nikoloudi* (2005), *Maruko* (2008), *Kleist* (2010), *Andersen* (2010), *WABE and Müller* (2021); (2) *Hay* (2013)	
Criterion is **used for reasons** related to discrimination	Principle explained in *Nikolova* (2015), concerning racial stereotypes or prejudices	
Criterion disadvantages persons from both groups, but puts or is liable to put persons of one group at a particular disadvantage		E.g. *Bilka* (1986), *Achbita* (2017), *Egenberger* (2018), *WABE and Müller* (2021)

Distinction on the level of justification

Objective justification is normally not available for cases concerning direct discrimination; see ***Chart 10/13***.

Source: Christa Tobler, Jacques Beglinger (2020) *Essential EU Law in Charts*, ***Chart 10/12***, as adapted in the light of recent CJEU case law.

D Challenges in the practical application of the concept of indirect discrimination

I INTRODUCTORY REMARKS

Whenever the legal concept of indirect discrimination is applied in practice, the examination of the case at hand will have to involve a three-step analysis relating to 1) the scope of the law, 2) the nature of the measure as amounting to apparent (or *prima facie*) indirect discrimination, and 3) objective or statutory justification. In this analysis, the following questions must be asked and answered:

1) Does the case fall within the field of application of the non-discrimination law that is to be applied in the relevant EU Member State (i.e. national law as seen against the background of EU law)?
2) If so, can the victim of the alleged discrimination show that there is apparent indirect discrimination on a particular ground?
3) If so, can the perpetrator show that there is justification that will prevent a finding of indirect discrimination?

In the following sections, a number of practical issues that may arise in the context of these questions under Directives 2000/43 and 2000/78 are discussed.

This report does not include a section on the challenges that may arise in relation to the issue of remedies and sanctions once discrimination has been found. In this respect, the reader should refer to other publications of the European network of legal experts in gender equality and non-discrimination on the issue of enforcement.[272]

However, it may be useful to recall that victims of discrimination have a right to the more advantageous treatment ('levelling up'), as long as the rule at issue has not been changed in the direction of the less advantageous treatment for all ('levelling down').[273] Further, EU law demands that sanctions be effective, proportionate and dissuasive (Article 15 of Directive 2000/43, Article 17 of Directive 2000/78).[274] With respect to indirect discrimination, it is important to remember that its indirect nature does not lessen the discriminatory effect on the victim: indeed, an individual victim of indirect discrimination suffers just as much as a victim of direct discrimination. Accordingly, there must not be a lesser reaction in terms of remedies and sanctions as compared to direct discrimination.

II THE SCOPE OF DIRECTIVES 2000/43 AND 2000/78

1 General remarks

In practical cases, the first challenge will always be to find applicable non-discrimination law. Whether or not any existing Union law applies, depends on the scope of that law. Accordingly, where a case raises the

272 Including notably: Iordache, R., Ionescu, I. (2022) *Effectively enforcing the right to non-discrimination. Promising practices implementing and going beyond the requirements of the Racial Equality and Employment Equality Directives*, European network of legal experts in gender equality and non-discrimination, Luxembourg: Publications Office of the European Union; Chopin, I., Germaine, C., Tanczos, J. (2017) *Roma and the Enforcement of anti-discrimination law,* Luxembourg: Publications Office of the European Union.

273 In the Court's more recent case law, see CJEU, Case C-482/16 *Georg Stollwitzer v ÖBB Personenverkehr AG,* 14 March 2018*,* ECLI:EU:C:2018:180, paragraph 30, with further references; *Cresco*, as of paragraph 70, and CJEU, Case C-406/15 *Petya Milkova v Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen kontrol,* 9 March 2017, ECLI:EU:C:2017:198, paragraph 66.

274 In the Court's more recent case law, see CJEU, Case C-396/17 *Martin Leitner v Landespolizeidirektion Tirol,* 8 May 2019*,* ECLI:EU:C:2019:375, as of paragraph 51. See also Tobler, C. (2005) *Remedies and Sanctions in EC non-discrimination law. Effective, proportionate and dissuasive national sanctions and remedies, with particular reference to upper limits on compensation to victims of discrimination,* European network of legal experts in the non-discrimination field, Luxembourg: Publications Office of the European Communities.

suspicion of, for example, racial or sexual orientation discrimination, the scope of Directives 2000/43 and 2000/78 must be checked. Both directives contain specific provisions on scope with positive and negative elements defining that scope. When called upon to judge on the applicability of non-discrimination law, national courts will have to take these elements into account.

Different aspects of scope must be distinguished: geographical, temporal, personal, and material. Of these, the geographical scope is perhaps the least difficult. In both Directives 2000/43 and 2000/78, Article 1 refers to the aim of 'putting into effect in the Member States the principle of equal treatment'. Distinct from the Union's internal market law, no cross-border element is required in this context. Instead, the two directives are simply meant to apply within the various Member States.[275]

With respect to the temporal scope, the period for the implementation of Directives 2000/43 and 2000/78 has long expired. Accordingly, both of them are fully applicable in the Member States. However, challenges may still arise in cases where facts from a longer period of time are at issue. For example, *Römer* concerned a same-sex partnership that was registered before the expiry of the implementation period for Directive 2000/78. As no other Union law was at issue that would have allowed the case to be tied to the general principle of equal treatment in relation to sexual orientation,[276] Mr Römer was able to find protection under Union law only with respect to the time covered by Directive 2000/78.

The personal scope of Directives 2000/43 and 2000/78 is particularly broad. As stated in Article 3, the Directives apply 'to all persons, as regards both the public and private sectors, including public bodies'. Examples from CJEU case law include, on the side of the complainants in national proceedings that form the basis for preliminary ruling cases, mostly individual human beings (e.g. *Rosenbladt*)[277] but sometimes also an entity acting on their behalf, such as a works council (e.g. *Tyrolean Airways*),[278] a trade union (e.g. *Andersen, Kristensen*,[279] *Toftgaard*)[280] or a non-governmental organisation (e.g. *Age Concern England*).[281] Most perpetrators are an employer, which may be a State entity or an individual company. The social partners who make the collective rules that govern the relationship between employees and their employers may play a role indirectly. *Hennigs and Mai*[282] provides a good example. Here, the CJEU was in essence asked whether the fact that the rules at issue in this case originated from a collective agreement changes the test for age discrimination. The Court first pointed to the provisions in Directive 2000/78 where collective agreements and the social partners are mentioned (Articles 16(1)(b) and 18, respectively). Referring to case law from the internal market law, the Court then reiterated that whilst the social partners enjoy the right of collective bargaining under Article 28 CFR, this is only within the limits of EU law. The Court concluded that when they adopt measures falling within the scope of Directive 2000/78, the social

275 The German expert mentions an interesting case where a German court applied the prohibition of discrimination on grounds of ethnic origin to a case that, in the view of the author of this report, is properly an internal market case: Germany, Berlin-Brandeburg Higher Labour Court, Ref. 15 SA 1163/19, 22 January 2020. The case concerned the requirement that an applicant for employment in the public service had to prove that her Romanian university degrees were equivalent to German university degrees. The national court held that it is incumbent on the German sub-state in question to assess the equivalence of the university degrees of the complainant. In the EU, the recognition of professional qualifications is regulated in specific secondary law on this matter. Where that law does not apply, a refusal to assess a foreign degree and to recognise it for so far as it is equivalent with a national degree amounts to a restriction of the free movement of persons (note: not indirect discrimination on grounds of nationality; see on the Court's very early case law on this issue Tobler, C. (2005) *Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*, p. 374. In contrast and in the author's view rather surprisingly, the German court in the held that there was indirect discrimination on the ground of ethnic origin within the meaning of Section 3.2 of the German General Act on Equal Treatment.

276 On the function of the general principles in this context, see B.I above.

277 CJEU, Case C-45/09 *Gisela Rosenbladt v Oellerking Gebäudereinigungsges. mbH.*, 12 October 2010, ECLI:EU:C:2010:601 (Grand Chamber).

278 CJEU, Case C-132/11 *Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH v Betriebsrat Bord der Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH,* 7 June 2012, ECLI:EU:C:2012:329.

279 CJEU, Case C-476/11 *HK Danmark acting on behalf of Glennie Kristensen v Experian A/S*, 26 September 2013, ECLI:EU:C:2013:590.

280 CJEU, Case C-546/11 *Dansk Jurist- og Økonomforbund, acting on behalf of Erik Toftgaard v Indenrigs- og Sundhedsministeriet*, 26 September 2013, ECLI identifier: ECLI:EU:C:2013:603.

281 CJEU, Case C-388/07 *The Queen, on the application of The Incorporated Trustees of the National Council for Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform*, 5 March 2009, ECLI:EU:C:2009:128.

282 CJEU, Joined Cases C-297/10 and C-298/10 *Sabine Hennigs (C-297/10) v Eisenbahn-Bundesamt and Land Berlin (C-298/10) v Alexander Mai*, 8 September 2011, ECLI:EU:C:2011:560.

partners must comply with the Directive. In *Rosenbladt*, the Court stated that whilst the Directive does not as such govern the issue of whether the Member States are allowed to declare collective agreements generally applicable, the Member States are obliged to ensure by all appropriate means that all workers are able to enjoy fully the protection granted by the Directive. Accordingly, the Member States are free to declare a collective agreement compulsory for persons who are not bound as parties to the agreement, as long as the agreement is not contrary to the Directive.

2 Specifically: material scope

a) Different coverage

Serious challenges may, however, arise with respect to the limited material scope of Directives 2000/43 and 2000/78. In this context, it should be noted that there is only one type of discrimination that is prohibited in all areas of Union law, namely discrimination based on a person's holding the nationality of an EU Member State (Article 18 TFEU and other, more specific Union law, such as Article 45 TFEU on the free movement of workers). In all other cases, the non-discrimination provisions of Union law have a limited field of application in terms of the substantive issues that are covered. In addition, there are marked differences between different pieces of legislation.

Within Union social law, anti-racism policy has been called 'the leader of the pack'.[283] According to Article 3(1) of Directive 2000/43, this Directive covers conditions for access to employment, to self-employment and to occupation, access to vocational guidance and training, employment and working conditions, membership of and involvement in an organisation of professional organisations, social protection, social advantages, and education, as well as access to and supply of goods and services which are available to the public. Article 3(2) excludes differences of treatment based on nationality, provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons in the territory of Member States as well as treatment that arises from the legal status of the third-country nationals and stateless persons concerned.

In that latter context, the *KV* case provides an interesting example. The case concerns a Turkish national, a long-term resident in Austria, who lost a housing subsidy as a result of a new rule according to which the entitlement to that benefit depended on proof, in a form specified by the law, that the person in question has a basic command of the language of Austria (German). In the case at hand, the difference in treatment was, precisely, between third-country nationals with long-term resident status and resident nationals. The Court concluded that such a difference in treatment does not come within the scope of Directive 2000/43.[284] At the same time, it noted that the case might fall under another equal treatment rule of Union law, namely Article 11 of Directive 2003/109 on long-term residents,[285] with which the criterion at issue might be incompatible.[286]

In comparison to Directive 2000/43, the scope of the Directive 2000/78 is much more limited. According to Article 1, this Directive aims to prohibit discrimination on the grounds of religion or belief, disability, age or sexual orientation solely as regards employment and occupation. Accordingly, the list of scope elements in Article 3(1) corresponds only partially to that in Directive 2000/43; it stops after the professional

283 Bell, M. (2007) 'EU anti-racism policy: the leader of the pack?', in: Meenan, H. (ed) *Equality Law in an Enlarged European Union. Understanding the Article 13 Directives*, Cambridge: Cambridge University Press, p. 178.

284 CJEU, Case C-94/20 *Land Oberösterreich v KV,* 10 June 2021, ECLI:EU:C:2021:477, paragraph 50 and following.

285 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ 2004 L 16/44.

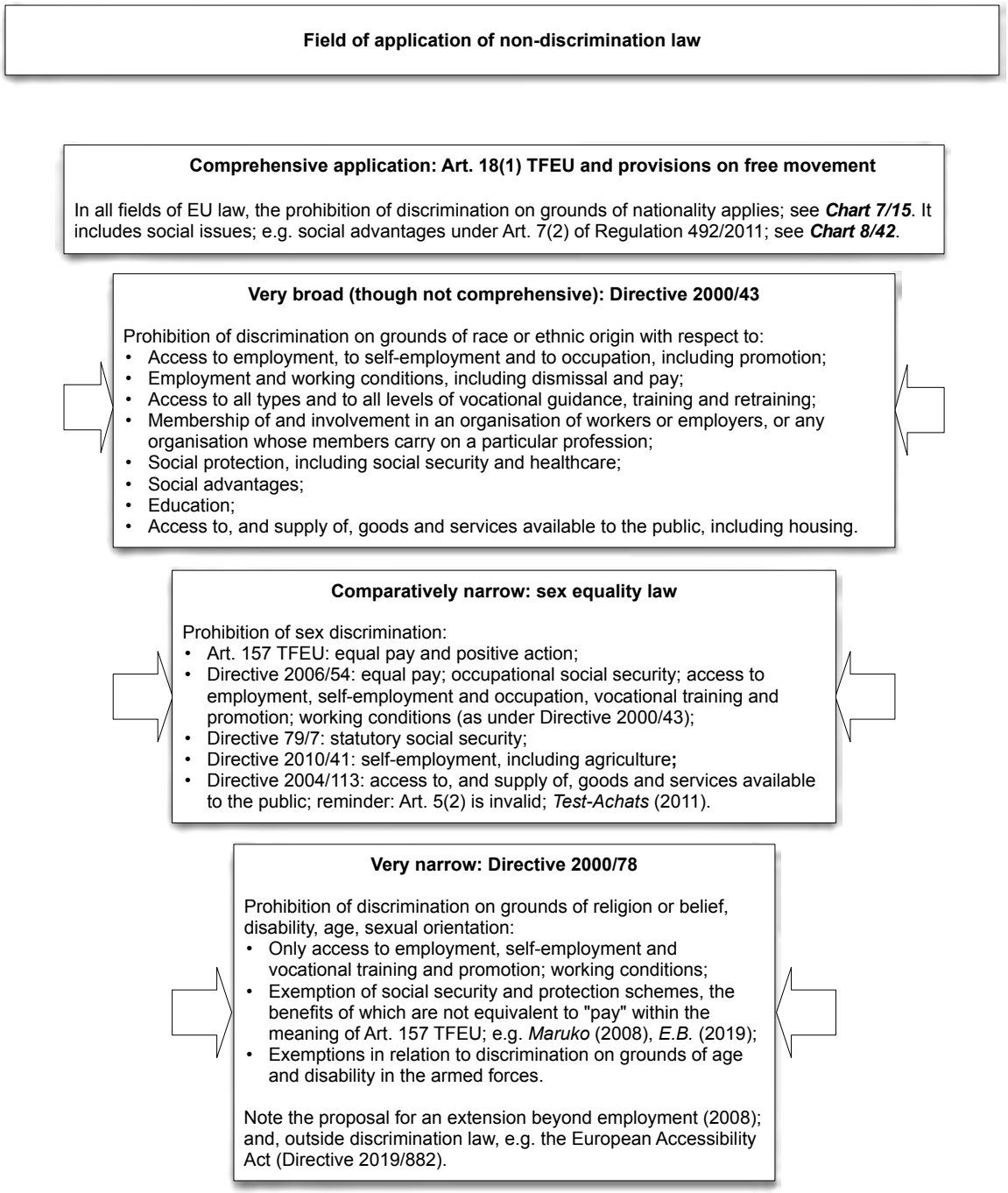
286 CJEU, Case C-94/20 *Land Oberösterreich v KV,* 10 June 2021, ECLI:EU:C:2021:477, paragraph 49; It may further be interesting to compare the *KV* case to the *'KOB' SIA* case, which also concerned language requirements – this time for foreign nationals in general – and which falls under the Services Directive in the field of the internal market (Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OF 2006 L 376/36). The Court found direct discrimination on the basis of nationality; CJEU, Case C-206/19 *'KOB' SIA v Madonas novada pašvaldības Administratīvo aktu strīdu komisija,* 11 June 2020, ECLI:EU:C:2020:463.

organisations. Article 3(2) contains the same exclusions as the Racial Equality Directive. Further, Article 3(3) excludes from the scope of the Directive 2000/78 payments made under state schemes or similar, including state social security or social protection schemes. Moreover, under Article 3(4), Member States may provide that the Directive, in so far as it relates to discrimination on the grounds of disability and age, will not apply to the armed forces.

To complete the picture, EU sex equality law is positioned between Directive 2000/43 and Directive 2000/78. It covers employment and occupation, social security and goods and services. This situation would change in some respects if the Member States were to adopt the directive proposed by the Commission in July 2008, which is intended to enlarge the protection against discrimination based on religion or belief, disability, age and sexual orientation.[287] This would bring the scope of Directives 2000/43 and 2000/78 closer together. However, it would leave sex equality law as the area with the smallest field of application, which is highly problematic given the function of sex or gender as a key category in our societies. At the time of writing, the proposal is still under discussion within the Council.[288]

287 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426 final.

288 See http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=197196.



Source: Christa Tobler, Jacques Beglinger (2020) *Essential EU Law in Charts*, ***Chart 10/8***.

Overall, the limitations in scope of Directives 2000/43 and 2000/78 mean that cases involving alleged discrimination may fall outside the scope of these Directives. However blatant the alleged discrimination may then appear to be, such cases will not involve discrimination from the point of view of Union law. For example, cases involving access to a service (such as insurance or a visit to a restaurant) will be covered if the alleged discrimination is based on sex, race or ethnic origin, but not if it is based on sexual orientation, religion or belief, disability or age. To give another example, if the case concerns education, then only discrimination based on race or ethnic origin is covered. At the most, such cases involve what may be termed 'factual discrimination', i.e. measures that, though not legally prohibited, appear discriminatory on the basis of different, extra-legal standards. Further, problems arise where a case involves a combination of grounds (multiple discrimination), and where EU law does not cover all of the issues to which the

alleged discrimination relates. In such cases, only the type(s) of discrimination covered by the law can be taken into account (see further D.V below).

At the same time, the Member States are free to prohibit discrimination on the grounds mentioned in Directives 2000/43 and 2000/78 in fields outside those covered by the Directives. Indeed, where the national law has a broader material scope than EU law, a victim of discrimination may be able to find legal redress on that level.[289] Examples of broader legislation will be mentioned in Part E of this report.

b) Interpretation of scope elements

Under CJEU case law, the general approach is that elements that define a right in a positive manner have to be interpreted in a broad manner, whilst elements that limit the right will have to be interpreted in a narrow manner. This applies also to scope elements. Thus, the Court emphasised in *Runevič-Vardyn*[290] that the scope of Directive 2000/43 cannot be interpreted restrictively. Still, broad as it is in terms of its material scope, Directive 2000/43 covers only matters that properly fall under it. For example, the *Runevič-Vardyn* case concerned national rules which provided that a person's surnames and forenames may be entered on the certificates of civil status of that State only in a form that complies with the rules governing the spelling of the official national language. In its judgment, the Court held that the term 'services' does not cover the issuing of official certificates of civil status. The Court in this context referred to an element in the history of the making of the Directive, namely the fact that the Council was unwilling to take into account an amendment proposed by the European Parliament whereby 'the exercise by any public body, including police, immigration, criminal and civil justice authorities, of its functions' would have been included in the list of activities in Article 3(1) of the Directive.

Particularly important in relation to the broad or narrow interpretation, as the case may be, are the terms 'pay', which is a positive scope element under both Directives 2000/43 and 2000/78, on the one hand, and 'social security and social protection' benefits, which is a negative scope element under Directive 2000/78, on the other hand. With respect to the latter, recital 13 in the preamble to the Directive clarifies that they are excluded from the scope of the Directive only insofar as they are not treated as income within the meaning given to that term for the purposes of what is today Article 157 TFEU, on equal pay for men and women workers. According to Article 157(2) TFEU, 'pay' means not only the ordinary basic or minimum wage or salary but also any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from the employer. The concept is very broad. For example, it includes assistance granted to public servants in the event of illness by the State, if it is the responsibility of the State, as a public employer, to finance it (*Dittrich*).[291] Also covered are occupational pensions paid after the termination of the employment relationship.[292] In contrast, a supplementary tax on retirement pension income, without any link to the contract of employment, derived directly and exclusively from national tax legislation, does not come under the concept of 'pay'.[293]
In the context of Directive 2000/78, the very broad definition of 'pay' means that the exclusion of 'social security and social protection' is correspondingly narrow. This was decisive for the question whether sexual orientation cases *Maruko* and *Römer* fell within the scope of Directive 2000/78, otherwise, EU law could be of no relevance in such cases.

289 See Dunne, P. (2020) *Sexual orientation discrimination law outside the labour market*, European network of legal experts in gender equality and non-discrimination Luxembourg: Publications Office of the European Union; Dewhurst, E. (2020) *Age discrimination law outside the employment field,* European network of legal experts in gender equality and non-discrimination Luxembourg: Publications Office of the European Union.

290 CJEU, Case C-391/09 *Malgožata Runevič-Vardyn, Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija, Lietuvos Respublikos teisingumo ministerija, Valstybinė lietuvių kalbos komisija, Vilniaus miesto savivaldybės administracijos Teisės departamento Civilinės metrikacijos skyrius*, 12 May 2011, ECLI:EU:C:2011:291, paragraph 43.

291 CJEU, Joined Cases C-124/11, C-125/11 and C-143/11 *Bundesrepublik Deutschland v Karen Dittrich and Robert Klinke and Jörg-Detlef Müller v Bundesrepublik Deutschland*, 6 December 2012, ECLI:EU:C:2012:771.

292 E.g. CJEU, Case C-267/06 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*, 1 April 2008, ECLI:EU:C:2008:179 (Grand Chamber), paragraph 44, with further references.

293 CJEU, Case C-122/15 C., 2 June 2016, ECLI:EU:C:2016:391.

III ESTABLISHING *PRIMA FACIE* INDIRECT DISCRIMINATION

Once the applicability of Union non-discrimination law in terms of its scope has been established, the next question is whether the case at hand *prima facie* involves indirect discrimination. The burden of proof for the existence of apparent indirect discrimination lies with the applicant, who has to 'establish facts from which it may be presumed that there has been [direct or] indirect discrimination' (Article 8(1) Directive 2000/43, Article 10(1) Directive 2000/78).[294] As noted by Henrard,[295] this implies that when identifying the markers relevant for a presumption of discrimination, there must be some relation to the substantive elements of discrimination, i.e. harm (less favourable treatment or disadvantage) and a causal relationship between that harm and the protected ground.

1 Causal link between disadvantage and a protected characteristic

On a general level, any finding of *prima facie* discrimination requires the complainant to establish to the required degree a causal link between the disadvantageous treatment and a prohibited discrimination ground. Indeed, the Court has emphasised time and again that there is discrimination only if the less favourable treatment is experienced as a result of, e.g. the religion or belief of a person or groups of persons.[296]

CJEU case law provides examples where this posed serious challenges and, sometimes, insurmountable difficulties. *Meister* is a prominent case in point.[297] Ms Meister applied two times for the same position with the company Speech Design but was invited for an interview on neither of these occasions, even though it was undisputed that she possessed the required qualifications. Ms Meister suspected that the reason for the refusal was discrimination on the grounds of sex (as a woman), age (she was 45 years old when she applied) and ethnic origin (she was a Russian national). The main issue raised by the case was whether the EU rules on the burden of proof must be interpreted as entitling a worker, who claims plausibly that she meets the requirements listed in a job advertisement and whose application was rejected, to have access to information indicating whether the employer engaged another complainant at the end of the recruitment process and, if so, on the basis of which criteria. The potential employer had not informed Ms Meister of the reasons for its decision not to invite her for an interview. It also refused to produce the file for the person who was eventually engaged, which Ms Meister had requested in order to enable her to prove that she was, in fact, more qualified than that other person.

In *Meister*, the CJEU recalled that EU law on the burden of proof does not specifically entitle persons who consider themselves discriminated against to the information needed by them in order to be able to establish facts from which it may be presumed that there has been direct or indirect discrimination in accordance with that provision. At the same time, it called it not inconceivable that a refusal of disclosure by the respondent, in the context of establishing such facts, is liable to compromise the achievement of the objective pursued by the Directive and, in particular to deprive the burden of proof rule of its effectiveness.

294 On the latter, see generally Tobler, C. (2020) 'Article 10. Charge de la preuve / Burden of proof' in: Dubout, E. (ed) *Directive 2000/78 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail. Commentaire article par article*, Brussels: Bruylant, pp. 257-276.

295 Henrard, K. (2019), p. 101.

296 CJEU, Joined Cases C-804/18 and C-341/19 *IX v WABE eV and MH Müller Handels GmbH v MJ*, 15 July 2021, ECLI:EU:C:2021:594 (Grand Chamber), paragraph 49.

297 CJEU, Case C-415/10 *Galina Meister v Speech Design Carrier Systems GmbH,* 19 April 2012, ECLI:EU:C:2012:217. For the following and more detailed information, see Tobler, C. (2020) 'Article 10. Charge de la preuve / Burden of proof', p. 266.

In other cases, where the facts appear to have been clearer, the Court held that there was no causal link to a prohibited discrimination ground. *Tyrolean Airways, Bowman,*[298] *Horgan and Keegan*[299] and *Universitatae 'Lucian Blaga' Sibiu*[300] provide examples.

- *Tyrolean Airways* concerned a clause in a collective agreement providing that advancement from employment category A to B was to occur on the completion of three years of service with the company. The CJEU found that whilst such a rule is likely to entail a difference in treatment according to the date of recruitment by the employer concerned, this difference is not, directly or indirectly, based on age or on an event linked to age. Rather, it was the experience that may have been acquired by a cabin crew member with another airline in the same group of companies that was not taken into account for grading, irrespective of the age of that cabin crew member at the time of recruitment.
- *Bowman* involved a rule which used to provide for advancements in pay based on age. Following a change, the new scheme made it possible to take periods of school education into account in so far as they exceed the general education obligation for the minimum period for that course of study required under the provisions of education law, but at most for three years. The Court found that periods of school education may be taken into account regardless of the age of the employee at the time of recruitment.
- In *Horgan and Keegan*, the salary of newly recruited teachers was, as of the year 2011, less advantageous than that applicable to teachers already employed. According to the national court, there was a clear difference in age between those two categories. Approximately 70 % of teachers who commenced employment in 2011 were 25 years of age or under, whilst the group previously employed was older. The Court, however, held that the criterion of being 'a new entrant to the public service as of 1 January 2011' is manifestly unconnected to any taking into account of the age of the persons recruited. In fact, the average age upon recruitment, whether before or after 1 January 2011, was the same.
- Similarly *Universitatae 'Lucian Blaga' Sibi* raised the question of whether there is discrimination under Directive 2000/78 where national law provides that, among members of the teaching staff of a university continuing to work there after reaching the statutory retirement age, only lecturers with doctoral supervisor status may retain their status as tenured lecturers, while lecturers without doctoral supervisor status may conclude only fixed-term employment contracts with that establishment, with less pay. The criterion employed was thus that of having doctoral supervisor status, i.e. a particular professional status. The Court held that this is not covered by any of the grounds listed in Article 1 of Directive 2000/78, and that such a difference in treatment cannot be founded on age, even indirectly, when those placed at an advantage or disadvantage by the national rules are in the same age group, namely individuals who have reached the statutory retirement age.

Where there is indeed a link with a prohibited discrimination ground, then the next question will be whether this link is direct or indirect, as previously discussed in this report (see C.VI.5 above). As noted by Henrard,[301] the question of when the causality between the harm and the protected discrimination ground is strong enough to denote direct discrimination and when it is so weak that one is faced with indirect discrimination is difficult.

298 CJEU, Case C-539/15 *Daniel Bowman v Pensionsversicherungsanstalt*, 21 December 2016, ECLI:EU:C:2016:977.
299 CJEU, Case C-154/18 *Tomás Horgan, Claire Keegan v Minister for Education & Skills, Minister for Finance, Minister for Public Expenditure & Reform, Ireland, Attorney General,* 14 February 2019, ECLI:EU:C:2019:113.
300 CJEU, Case C-644/19, *FT v Universitatea 'Lucian Blaga' Sibiu, GS and Others, HS, Ministerul Educației Naționale*, 8 October 2020, ECLI:EU:C:2020:810.
301 Henrard, K. (2019) 'The Effective Protection against Discrimination and the Burden of Proof. Evaluating the CJEU's Guidance Through the Lens of Race', p. 107.

2 Showing a particular disadvantage as compared to other persons

a) Actual or potential disparate effect

Indirect discrimination requires 'a particular disadvantage compared with other persons', i.e. the detrimental effect must reach a certain level. What this means is not explained further in the Directives, and neither can a precise limit be identified on the basis of the case law of the Court of Justice. In *Nikolova*, the Court noted rather generally that indirect discrimination 'is liable to arise when a national measure, albeit formulated in neutral terms, works to the disadvantage of *far more* persons possessing the protected characteristic than persons not possessing it' and that the practice in question was 'liable to affect persons possessing such an ethnic origin in *considerably greater proportions* and accordingly to put them at a particular disadvantage compared with other persons'.[302] (emphasis added)

In the much older sex equality case of *Seymour-Smith,*[303] the Court referred to the requirements of 'a more unfavourable impact on women than on men' and of 'a considerably smaller percentage of women than men' able to benefit. The Court indicated two distinct situations where this will be the case. The first is where 'a considerably smaller percentage of women than men' is able to satisfy the condition in question. In other words, in this case the disparity must be considerable. Alternatively, there may be 'a lesser but persistent and relatively constant disparity over a long period between men and women who satisfy the requirement.' However, the Court did not quantify the required disparate effect for either situation.

De Vos[304] concludes from CJEU case law that 'while indirect discrimination formally hinges on a "particular disadvantage" for the protected group, its application by the CJEU has rejected any particular degree of seriousness of group impact as a criterion. Instead, the Court only requires impact that is broadly likely to affect persons with a protected characteristic, as compared to other persons. By avoiding a restrictive disadvantage requirement, the Court deliberately seeks to maximize the substantive aim of indirect discrimination as a concept.' Indeed, the CJEU has explained in *Nikolova*[305] that the element of 'a particular disadvantage' is not an issue of a serious, obvious and particularly significant case of inequality, but rather of a particular effect on particular groups of people.

In practice, an identification of a precise level of disparate impact will often not be necessary. Under the definitions of indirect discrimination in Directives 2000/43 and 2000/78 it is sufficient that the measure in question '*would* put persons […] at a particular disadvantage' (the liability test, emphasis added). In other words, a potential detrimental effect is sufficient for these purposes. Depending on the circumstances, this may be an easier test than a test based on statistics, since the Court will be able to make a 'common sense assessment'[306] by relying on common knowledge (e.g. *Horgan and Keegan*, in the context of age discrimination), on obvious facts (e.g. *Schnorbus*,[307] in the context of sex equality) or on its own conviction or experience (e.g. *O'Flynn*, in the context of discrimination based on nationality).[308]

302 CJEU, Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia (third parties: Anelia Nikolova, Darzhavna Komisia za energiyno i vodno regulirane)*, 16 July 2015, ECLI:EU:C:2015:480 (Grand Chamber), paragraphs 101 and 107, respectively.

303 CJEU, Case C-167/97 *The Queen v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Per, 9 February 1999,* ECLI:EU:C:1999:60, paragraphs 58 and 60.

304 De Vos, M. (2020) 'The European Court of Justice and the march towards substantive equality in European Union anti-discrimination law', *International Journal of Discrimination and the Law*, Vol. 20, pp. 70 and 71.

305 CJEU, Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia (third parties: Anelia Nikolova, Darzhavna Komisia za energiyno i vodno regulirane)*, 16 July 2015, ECLI:EU:C:2015:480 (Grand Chamber), paragraphs 98 and 99.

306 See Makkonen, T. (2007), *Measuring Discrimination. Data Collection and EU Equality Law,* Luxembourg: Office for Official Publications of the European Communities, p. 34.

307 CJEU, Case C-79/99, *Julia Schnorbus v Land Hessen*, 7 December 2000, ECLI:EU:C:2000:676.

308 See on this issue also Fredman, S. (2011), *Discrimination Law*, p. 187 and following.

Accordingly, the assessment of the disparate effect does not necessarily have to be based on quantitative proof (statistics) but may be based on qualitative proof instead. Mulder[309] explains that the latter term refers to 'a substantive argument that explains why a measure carries a particular disadvantage without statistical demonstration of that disadvantage'. She notes the advantages of qualitative proof but also the danger of reinforcing stereotypes through it.

b) Statistical proof

However, the ability to use qualitative proof does not mean that statistical proof is irrelevant. The preambles to Directives 2000/43 and 2000/78 state explicitly that the rules of national law or practice 'may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence' (recital 15).

Fredman[310] has argued that it should be sufficient to show that the difference in impact between the groups is statistically significant, for the burden of proof of justification to pass on to the respondent. This approach is indeed recognised in CJEU case law, which confirms that 'it is for the national court to assess to what extent the statistical evidence adduced before it is valid and whether it can be taken into account, that is to say, whether, for example, it illustrates purely fortuitous or short-term phenomena, and whether it is sufficiently significant [...].' The Court has also held '(i) that the referring court must take into account all those workers subject to the national legislation in which the difference in treatment has its origin and (ii) that the best approach to the comparison is to compare the respective proportion of workers that are and are not affected by the alleged difference in treatment among the men in the workforce who come within the scope of that legislation with the same proportion of women in the workforce coming within its scope'.[311]

In fact, to obtain statistical proof may pose a number of challenges.[312] At the heart of this issue is the comparison to be made. First, in some cases, it may be difficult to find comparators, for example in the case of age discrimination. Secondly, the appropriate moment or time period for the comparison must be identified. Thirdly, statistical material concerning the relevant groups must be found, which in the context of Directives 2000/43 and 2000/78 is often difficult or even impossible. In particular, there is a lack of relevant data on race and ethnic origin and on sexual orientation. Fourthly, the requirement according to which the statistical material relied on in a discrimination case must be relevant or significant means that it must cover enough individuals and, in cases that do not concern a single action, that it should not illustrate purely fortuitous or short-term phenomena.

Given this situation, the national courts should, wherever possible under national law, apply the liability test which is easier to meet, without, however, excluding statistical proof where it may help the victims of alleged discrimination to show the existence of a disparate impact. In the interest of the effectiveness of the prohibition of indirect discrimination, it is recommended that Member State legislators do not make statistical proof compulsory.

3 Comparability of the situations?

There is also the question of whether a finding of indirect discrimination requires the comparability of the situations of those benefiting from the advantageous treatment and of those who suffer from the disadvantageous treatment.

309 Mulder, J. (2021) *Indirect sex discrimination in employment*, p. 87 and following.
310 See also Fredman, S. (2011), *Discrimination Law*, p. 186.
311 CJEU, Case C-223/19 *YS v NK AG*, 24 September 2020, ECLI:EU:C:2020:753, paragraphs 51 and 52.
312 See on this issue also the Report from the European Commission to the European Parliament and the Council on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('the Racial Equality Directive') and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ('the Employment Equality Directive'), COM(2021) 139 final, p. 8.

The case is clear with respect to *direct* discrimination, as here the legal definition of that concept in Directives 2000/43 and 2000/78 explicitly mentions the comparability of the situations ('in a comparable situation'). The Court has explained in this respect that, on the one hand, it is required not that the situations be identical, but only that they be comparable and, on the other hand, that the assessment of that comparability must be carried out not in a global and abstract manner, but in a specific and concrete manner in the light of the benefit concerned.[313]

Conversely, no requirement of the comparability of the situations appears in the legal definition of *indirect* discrimination. Indeed, the part 'compared with other persons' in the definition refers to the disadvantage that is suffered ('a particular disadvantage as compared to other persons'), rather than to any comparability of the situations.

It is therefore confusing to note that, occasionally, the CJEU also allows for comparability to be taken into account in the context of indirect discrimination. An example in the context of Directive 2000/78 is provided by the *Singh Bedi* case, concerning bridging assistance paid to former civilian employees of the allied forces in Germany, which was stopped upon the recipient becoming entitled to early payment of a retirement pension for disabled persons under the statutory pension scheme. The Court found that such a rule is liable to place disabled workers at a disadvantage and so to bring about a difference of treatment indirectly based on disability. It then turned to an argument brought forward by Germany (which was acting on behalf of the United Kingdom of Great Britain and Northern Ireland) that severely disabled workers and non-disabled workers have objectively different starting points in respect of their need for bridging assistance, since the former would no longer be in need of that assistance, in contrast to the latter. However, according to the Court, workers in age brackets approaching retirement are in a situation comparable to that of other workers concerned by a redundancy, and the advantage granted to severely disabled workers consisting in entitlement to claim a retirement pension from a younger age than non-disabled workers does not place them in a different situation in relation to those workers. Consequently, the Court found severely disabled workers to be in a situation comparable to that of non-disabled workers in the same age bracket in light of Article 2(2)(b) of Directive 2000/78.[314]

In order to avoid the danger of undermining the effectiveness of the prohibition of indirect discrimination, it is important that national authorities and courts are particularly careful about the issue of comparability. Indeed, in academic writing Schiek has argued that reliance on comparability in the context of indirect discrimination is dogmatically unsound.[315] Alternatively, Mulder[316] has suggested that similarities and differences between the groups should be weighed in the context of judging the legitimacy of the aim for the purposes of objective justification. This author argues that, in the case of indirect discrimination, the 'apparently neutral' measures have a different effect on different persons, because they are in different situations to begin with. Accordingly, a 'similar situation test' should not precede an indirect discrimination assessment.

IV ESTABLISHING (OBJECTIVE) JUSTIFICATION

1 Shifting of the burden of proof

Once the applicant has succeeded in showing facts from which it may be presumed that there has been indirect discrimination, 'it is for the respondent to prove that there has been no breach of the principle of equal treatment' (Article 8(1) of Directive 2000/43, Article 10(1) of Directive 2000/78). As noted by

313 E.g. CJEU, Case C-143/16, *Abercrombie & Fitch Italia Srl v Antonino Bordonaro*, 19 July 2017, ECLI:EU:C:2017:566, paragraph 25.
314 CJEU, Case C-312/17 *Surjit Singh Bedi v Bundesrepublik Deutschland, Bundesrepublik Deutschland in Prozessstandschaft für das Vereinigte Königreich von Großbritannien und Nordirland,* 19 September 2018, ECLI:EU:C:2018:734, paragraph 55 and following.
315 Schiek, D. (2007) 'Indirect Discrimination', p. 468 and following.
316 Mulder, J. (2021) *Indirect sex discrimination in employment*, p. 50 and following.

Henrard,[317] the respondent can, first of all, try to rebut the presumption of discrimination by negating the harm or the causal relationship between the harm and the discrimination ground. If that is not successful, the respondent can try to put forward justification for the presumed discrimination. The latter involves a legitimate aim and a proportionate (i.e. appropriate and necessary) measure. In the context of the open category of objective justification that is part of the definition of indirect discrimination, establishing the former is easier than the latter.

The Court held in *Age Concern England,* in a case concerning alleged age discrimination and Article 6(1) of Directive 2000/78, that the legitimacy of the aim relied on must be established to a high standard of proof. However, where State measures are at issue, this contrasts with the fact that the Member States enjoy a broad margin of discretion in their choices of social policy aims and measures, due to the fact that it is them who are primarily competent to regulate such matters, as already noted. The same is true with respect to proportionality, where the Court sometimes uses broad statements such as 'it does not appear unreasonable' or 'it does not appear manifestly inappropriate'.[318] This loose approach has been criticised in academic writing.[319]

In practice, a particular challenge for the national courts lies in the fact that CJEU case law in the preliminary ruling procedure may go no further than leading the referring court through the issues that it must address in the context of objective justification, leaving the actual assessment to the national court. There are, however, exceptions. *Nikolova* with its 'none-too-subtle steer' (McCrudden)[320] towards a finding that the measure in question was not proportionate is a case in point.

Overall, national courts do well to take the restrictive nature of derogations from the prohibition of discrimination seriously and to refrain from accepting objective justifications too easily.

2 Competing rights and justification

A particular challenge presents itself where the justification relied on relates to a right of the alleged discriminator that competes or conflicts with a right of the victim of the alleged discrimination (i.e. the right which is at the basis of the discrimination complained of). Directive 2000/78 contains provisions relating to this problem. First, Article 2(5) states that the Directive is without prejudice to 'measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and *for the protection of the rights and freedoms of others*' (emphasis added). Further, Article 4(2) concerns occupational requirements in relation to activities within churches and other public or private organisations the ethos of which is based on religion or belief. In contrast, Directive 2000/43 does not contain any corresponding rules. Here, a parallel may perhaps be drawn with CJEU case law in the field of free movement, according to which the protection of fundamental rights may justify restrictions of free movement.[321]

The Court's decisions in the headscarf cases *Achbita, Bougnaoui*, *WABE and Müller*,[322] confirm that the matter of conflicting rights is to be analysed in the context of justification (and the same is true in the context of the ECHR).[323] In these cases, the employers, when taxed with discrimination based on religion

317 Henrard, K. (2019) 'The Effective Protection against Discrimination and the Burden of Proof. Evaluating the CJEU's Guidance Through the Lens of Race', p. 102.
318 E.g. CJEU, Case C-99/08 *Ingeniørforeningen i Danmark, acting on behalf of Ole Andersen v Region Syddanmark,* 12 October 2010, ECLI:EU:C:2010:600 (Grand Chamber), paragraph 31.
319 Waddington, L. (2008) 'Annotation of *Palacios de la Villa*', *Common Market Law Review* 45; Mulder, J. (2021) *Indirect sex discrimination in employment*, p. 73, with further references.
320 McCrudden, C. (2016) 'The New Architecture of EU Equality Law after CHEZ: Did the Court of Justice reconceptualise direct and indirect discrimination?', p. 9.
321 See, e.g. CJEU, Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, 11 December 2007, ECLI:EU:C:2007:772 (Grand Chamber).
322 At the time of writing this report, a further case is pending, namely CJEU, Case C-344/20 *L.F. v SCRL*.
323 See F. European Court of Human Rights (2021) *Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention. Prohibition of discrimination*, Strasbourg: Council of Europe, paragraph 123.

against their employees, invoked a right of their own, namely the freedom to conduct a business as guaranteed in Article 16 CFR, in order to justify their rules on what (not) to wear to work. In addition, the *WABE and Müller* case also involved the right of the clients of the childcare centres, namely the parents, to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions, as recognised in Article 14(3) CFR.

In *WABE and Müller*,[324] the Court emphasises the need to balance competing rights in the following manner:

> '[W]hen several fundamental rights and principles enshrined in the Treaties are at issue, such as, in the present case, the principle of non-discrimination enshrined in Article 21 of the Charter and the right to freedom of thought, conscience and religion guaranteed in Article 10 of the Charter, on the one hand, and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions recognised in Article 14(3) of the Charter and the freedom to conduct a business recognised in Article 16 of the Charter, on the other hand, the assessment of observance of the principle of proportionality must be carried out in accordance with the need to reconcile the requirements of the protection of those various rights and principles at issue, striking a fair balance between them [...].'[325]

The Court's approach in the case law on religious clothing has been much criticised in academic writing, as giving too much weight to the employer's rights.[326] However, it should be noted that the Court has become stricter in terms of the test that must be applied. Thus, in *WABE and Müller* the Court held that the employer must demonstrate a genuine need in this respect and that of particular relevance will be evidence adduced by the employer in that respect (see C.IV.3.b.ii above). Accordingly, when national courts examine a case where different rights compete, they must engage in a particularly careful analysis of the proportionality of the restricting action.

V DEALING WITH PARTICULARLY COMPLEX SITUATIONS: MULTIPLE DISCRIMINATION

The fact that people have multiple identities means that discrimination cases may involve several discrimination grounds at once. This is recognised in Directives 2000/43 and 2000/78, where the preambles refer (specifically) to the fact that women are often the victims of multiple discrimination (recitals 14 and 3 of the preambles of Directives 2000/43 and 2000/78, respectively). A European Commission report published in 2007[327] concluded that minority women seem to be the most vulnerable to multiple discrimination, but many other combinations of grounds are possible as well. In a more recent report from 2021, the European Commission confirmed the importance of intersectional discrimination and acknowledged the need to address this phenomenon in all its equality strategies.[328]

324 CJEU, Joined Cases C-804/18 and C-341/19 *IX v WABE eV and MH Müller Handels GmbH v MJ*, 15 July 2021, ECLI:EU:C:2021:594 (Grand Chamber), paragraph 84.

325 The Court in this context refers to previous case law from the field of animal protection, see CJEU, Case C-336/19 *Centraal Israëlitisch Consistorie van België and Others v Vlaamse Regering,* 17 December 2020, ECLI:EU:C:2020:1031, paragraph 65, with further references.

326 There are numerous annotations on that case law, as indicated in the EU's EUR-Lex database. For a particularly critical example see Frantziou, E. (2021) 'Joined cases C-804/18 and C-341/19, *IX* v *WABE eV* and *MH Muller Handels GmbH* v *MJ*: religious neutrality in a private workplace? Employer friendly and far from neutral', *European Law Review* No. 5. See also generally the following thematic reports: Howard, E. (2019) *Religious clothing and symbols in employment. A legal analysis of the situation in the EU Member States*, European network of legal experts in gender equality and non-discrimination, Luxembourg: Office for Official Publications of the European Union; Vickers, L. (2006) *Religion and Belief Discrimination in Employment – the EU Law*, European network of legal experts in the non-discrimination field, Luxembourg: Office for Official Publications of the European Communities.

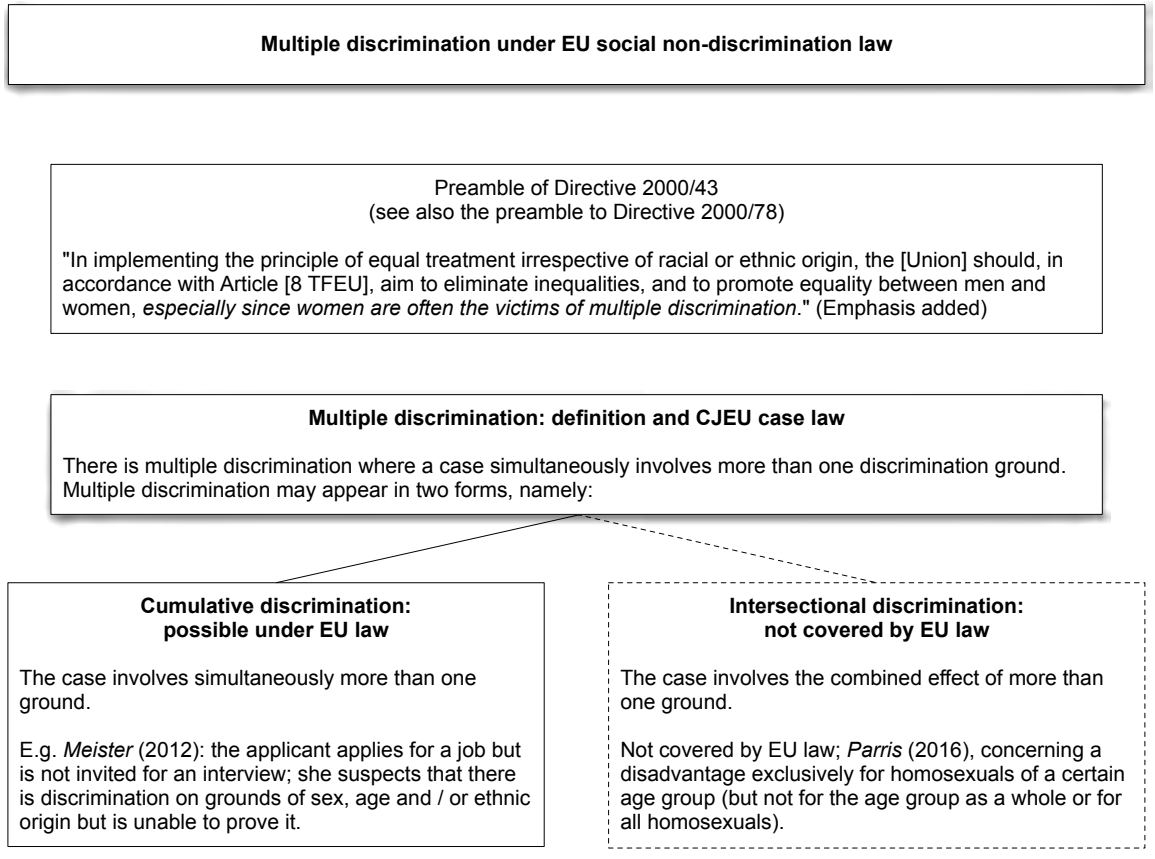
327 European Commission (2007) *Tackling Multiple Discrimination. Practices, policies and laws*, Luxembourg: Office for Official Publications of the European Communities, p. 5.

328 See Report from the European Commission to the European Parliament and the Council on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('the Racial Equality Directive') and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ('the Employment Equality Directive'), COM(2021) 139 final, p. 4 and following.

In practice, multiple discrimination may take different forms. In a thematic report written for the European network of legal experts in gender equality and non-discrimination, Fredman[329] distinguishes the following three main situations:

- *Sequential multiple discrimination:* when a person suffers discrimination on different grounds on separate occasions (e.g. based on disability on one occasion and based on sex on another occasion);
- *Additive multiple discrimination:* when a person is discriminated against on the same occasion but in more than one way, namely based on more than one discrimination ground (e.g. simultaneously based on sexual orientation and based on ethnic origin);
- *Intersectional discrimination:* when two or multiple grounds operate simultaneously and interact in an inseparable manner, producing distinct and specific forms of discrimination (e.g. only old women are disadvantaged, but not women in general or persons of the relevant age group in general).

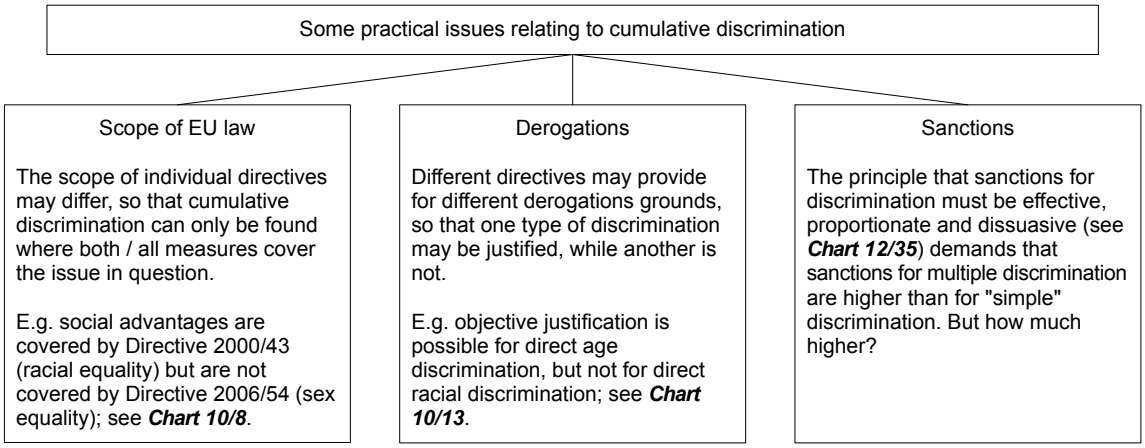
Instances of additive multiple discrimination may consist of different combinations of types of discrimination, such as direct combined with indirect discrimination (as in the case of *Odar*) or of indirect discrimination only.[330] As Fredman[331] notes, multiple discrimination other than in the first situation can raise complex issues which relate, among others, to the exhaustive list of discrimination grounds, differing scopes as well as differing defences and derogations under the various instruments of EU law.



329 See notably Fredman, S. (2016), *Intersectional Discrimination in EU gender equality and non-discrimination law*, European network of legal experts in gender equality and non-discrimination, Luxembourg: Publications Office of the European Union, pp. 27 and following. See further for a comparative account Mercat-Bruns, M. (2017) 'Multiple discrimination and intersectionality: issues of equality and liberty: Multiple discrimination and intersectionality', *International Social Science Journal* 67, pp. 43-54.

330 On the latter, see Kleber, E. (2015) *La discrimination multiple: étude de droit international, suisse et européen*, Geneva: Schulthess éditions romandes, pp. 383 and 384.

331 Fredman, S. (2016), *Intersectional Discrimination in EU gender equality and non-discrimination law*, p. 62 and following.



Source: Christa Tobler, Jacques Beglinger (2020) *Essential EU Law in Charts*, ***Chart 10/9***.

With respect to justification, the Court's judgment in *Odar*[332] provides an illustrative example. In *Odar*, the applicant disagreed with the amount of compensation that he received, in the context of a social contingency plan, upon his dismissal. In calculating the compensation, a certain formula was applied based on age and on the earliest date from which an old-age pension can be claimed. The latter was earlier for severely disabled persons such as Dr Odar. As a result, Dr Odar received only half of what he would have received under the standard formula. The case explicitly raised the question of whether Dr Odar's treatment amounted to discrimination based on age *and* disability. Whilst the Court found that in such a situation there is indirect discrimination based on disability (i.e. differential treatment based on the earliest date when a pension can be claimed, which is earlier for disabled persons, for which there was no justification), it also found that there is no (direct) age discrimination as the differential treatment based on age could be justified based on the nature of the social plan.

The attitude of the CJEU with respect to multiple discrimination[333] is that 'discrimination may indeed be based on several of the grounds' that are protected under EU law, but that EU law does not provide a basis for the recognition of intersectional discrimination: 'no new category of discrimination resulting from the combination of more than one of those grounds [...] may be found to exist where discrimination on the basis of those grounds taken in isolation has not been established'.[334]

Moreover, the Court's attitude in the context of actual cases of multiple discrimination so far has not been particularly helpful. It is true that in some cases, the Court does give meaningful guidance, although only with respect to cases of additive multiple discrimination. For example, in the *YS* case, which concerned alleged indirect age and sex discrimination, the Court set out step by step what the national court must examine with respect to, first, indirect sex discrimination and, second, indirect age discrimination. Judging the matter was left very largely to the national court.

In contrast, the Court in *WABE and Müller* quite simply and rather explicitly avoided the issue of multiple discrimination, for no convincing reason. In this case, one of the national courts that had turned to the CJEU for a preliminary ruling asked specifically whether an employer's prohibition of the wearing at work of any visible sign of political, ideological or religious beliefs constitutes 'indirect discrimination on the grounds of religion and/or gender, within the meaning of Article 2(1) and Article 2(2)(b) of Directive [2000/78],

332 CJEU, Case C-152/11 *Johann Odar v Baxter Deutschland GmbH,* 6 December 2012, ECLI:EU:C:2012:772.
333 For a more detailed account on CJEU case law, see Xenidis, R. (2019) 'Multiple Discrimination in EU Anti-Discrimination Law. Towards Redressing Complex Inequality?', in: Belavusau, U., Henrard, K. (eds) (2019) *EU Anti-Discrimination Law Beyond Gender*, Oxford: Hart Publishing, p. 59 and following.
334 CJEU, Case C-443/15 *David L. Parris v Trinity College Dublin, Higher Education Authority, Department of Public Expenditure and Reform, Department of Education and Skills,* 24 November 2016, ECLI:EU:C:2016:897, paragraph 80.

against a female employee who, due to her Muslim faith, wears a headscarf'.[335] The Court, even though it recognised that the rule in question disadvantaged almost exclusively female workers who wear a headscarf because of their Muslim faith,[336] brushed the issue of multiple discrimination aside with the argument that the national court's question did not relate specifically to EU sex equality law but only to Directive 2000/78. Frantziou[337] rightly calls this a legalistic and superficial response to a directional question for this field (i.e. a field where the factual discrimination of women who wear a headscarf because of their Muslim faith has been widely recognised).[338] In Frantziou's opinion, acknowledging the problem of multiple discrimination in the *WABE and Müller* case would not have implied the need to apply different pieces of Union law; instead, it could have heightened the proportionality scrutiny under Directive 2000/78, i.e. in the context of the analysis of discrimination based on religion.[339]

In the earlier case of *Parris*, the Court addressed the problem at hand but it did so in a way that has been much criticised in academic writing. The case concerned the payment of a survivor's benefit to their civil partner under Irish law. Born in the year 1946, Mr Parris had been living for over 30 years in a stable relationship with his male partner. Following the introduction of registered partnerships in the UK, Mr Parris – then aged 63 – and his partner entered into such as partnership. At the time, this was not possible in Ireland, where Mr Parris had been working, at Trinity College Dublin, since 1972. In Ireland, such partnerships were introduced only in 2011, after Mr Parris's retirement. When he then made a request for a survivor's pension for his partner following his death, this was refused based on the fact that the entitlement to the benefit was legally tied to the condition that the marriage or the registered partnership had been contracted before the 60th birthday of the member of the scheme. This was, however, legally not possible for homosexual persons of a certain age group, to which Mr Parris belonged.

Whilst AG Kokott in her opinion on the *Parris* case recognised both indirect discrimination based on sexual orientation and direct age discrimination,[340] the Court took a different view. With respect to sexual orientation, it noted that according to recital 22 in the preamble to Directive 2000/78, the Directive is without prejudice to national laws on marital status and the benefits dependent thereon. Accordingly, the Member States are free to provide or not provide for marriage for persons of the same sex, or an alternative form of legal recognition of their relationship, and, if they do so provide, to lay down the date from which it is to have effect, and the lack of such a status does not lead to discrimination under the Directive.[341]

Turning to age discrimination, the Court recognised that the national rules at issue in the *Parris* case established a difference in treatment based directly based on age but then found that it was justified based on a (compared to the AG's Opinion) broad interpretation of Article 6(2) of Directive 2000/78.[342] The Court added that the fact that it was legally impossible for the member of the scheme at issue in the main proceedings to enter into a civil partnership before reaching the age of 60 does not affect that conclusion at all, since that impossibility is a consequence of the fact that, on Mr Parris's 60th birthday,

335 CJEU, Joined Cases C-804/18 and C-341/19 *IX v WABE eV and MH Müller Handels GmbH v MJ*, 15 July 2021, ECLI:EU:C:2021:594 (Grand Chamber), paragraph 34.

336 CJEU, Joined Cases C-804/18 and C-341/19 *IX v WABE eV and MH Müller Handels GmbH v MJ*, 15 July 2021, ECLI:EU:C:2021:594 (Grand Chamber), paragraph 59.

337 Frantziou, E. (2021) 'Joined cases C-804/18 and C-341/19, *IX* v *WABE eV* and *MH Muller Handels GmbH* v *MJ*: religious neutrality in a private workplace? Employer friendly and far from neutral', p. 681.

338 In a broader context, see Doris Weichselbaumer, 'Multiple discrimination against female immigrants wearing headscarves', *Industrial and Labour Relations Review* 73 (2020), 600-627.

339 A similar approach is taken by Mulder, J. (2021) *Indirect sex discrimination in employment*, p. 96 and following, in the context of the *Parris* case.

340 CJEU, Case C-443/15 *David L. Parris v Trinity College Dublin, Higher Education Authority, Department of Public Expenditure and Reform, Department of Education and Skills,* Opinion of AG Kokott, 24 November 2016, ECLI:EU:C:2016:493.

341 CJEU, Case C-443/15 *David L. Parris v Trinity College Dublin, Higher Education Authority, Department of Public Expenditure and Reform, Department of Education and Skills*, 24 November 2016, ECLI:EU:C:2016:493, paragraph 30 and following.

342 According to this provision, Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.

national law did not provide for any form of civil partnership for same-sex couples and EU law did not preclude that state of national law. Again, the Court found that there was no discrimination.[343]

Having looked at both discrimination grounds separately, the Court then proceeded to consider their combined effect, with the above-mentioned result of holding that intersectional discrimination is not covered by the Union law in question. Again, AG Kokott had suggested a different approach. In her opinion, where discrimination cannot be established solely on the basis of one of the grounds for a difference of treatment referred to in Article 1 of Directive 2000/78 the situation must be examined from the point of view of indirect discrimination: in such a case, it must examined, in the light of Article 2(2)(b) of the Directive, whether the measure in question puts the persons concerned at a particular disadvantage specifically on account of a *combination* of two or more grounds for a difference of treatment. AG Kokott added that the combination of two or more of the grounds for a difference of treatment may also mean that, in the context of the reconciliation of conflicting interests for the purposes of the proportionality test, the interests of the disadvantaged employees carry greater weight, which increases the likelihood of undue prejudice to the persons concerned, thus infringing the requirements of proportionality *sensu stricto*.[344]

Academic criticism of the *Parris* judgment abounds, including accusing the Court of a blind spot, a failed opportunity and of misuses and non-uses of intersectionality. There is also further criticism of the Court's findings on the non-existence of discrimination under the two grounds that were at issue.[345]

Importantly, the Court's rigid approach to intersectional discrimination does not *oblige* the Member States to follow this approach. The fact that, under the Court's present case law, the matter is not covered by EU law, means that the Member States are free to provide meaningful protection against intersectional discrimination. In doing so, they can look to a number of interesting approaches that have been developed in other legal orders as well as in academic writing.

With respect to other legal orders, it is important to note that the refusal of the CJEU to recognise intersectional discrimination under Union law is in stark contrast to the approach of the European Court of Human Rights in the case of *B.S. v Spain*.[346] In this case the applicant, a black woman working as a prostitute, claimed that she had been treated in a particular manner due to her being a black woman, whilst other women of a 'European phenotype' had not been treated thus. More specifically, the applicant submitted that her position as a black woman working as a prostitute made her particularly vulnerable to discriminatory attacks and that those factors could not be considered separately but should be taken into account in their entirety, their interaction being essential for an examination of the facts of the case. The ECtHR found that the decisions made by the domestic courts failed to take account of the applicant's particular vulnerability inherent in her position as an African woman working as a prostitute, which amounted to a breach of Article 14 ECHR (taken in conjunction with Article 3 in its procedural aspect). Comments note that this case is about intersectional discrimination.[347]

343 CJEU, Case C-443/15 *David L. Parris v Trinity College Dublin, Higher Education Authority, Department of Public Expenditure and Reform, Department of Education and Skills,* 24 November 2016, ECLI:EU:C:2016:493, paragraph 63 and following.

344 CJEU, Case C-443/15 *David L. Parris v Trinity College Dublin, Higher Education Authority, Department of Public Expenditure and Reform, Department of Education and Skills,* Opinion of AG Kokott, 24 November 2016, ECLI:EU:C:2016:493, paragraph 147 and following.

345 Instead of many, see, e.g. Atrey. S. (2018) 'Illuminating the CJEU's Blind Spot of Intersectional Discrimination in Parris v Trinity College Dublin', *Industrial Law Journal*, pp. 278-296; Xenidis, R. (2019) 'Multiple Discrimination in EU Anti-Discrimination Law. Towards Redressing Complex Inequality?', p. 69 and following; Tryfonidou, A. (2017) 'Another failed opportunity for the effective protection of the rights of same-sex couples under Eu law: *Parris* v *Trinity College Dublin and Others*', *Anti-Discrimination Law Review* No. 2, pp. 83-95, and Schiek, D. (2018) 'On uses, mis-uses and non-uses of intersectionality before the Court of Justice (EU)', *International Journal of Discrimination and the Law* 18, p. 90 and following.

346 ECtHR, *B.S. v Spain,* 24 July 2012 (Application no. 47159/08).

347 E.g. Yoshida, K. (2013) 'Towards Intersectionality in the European Court of Human Rights: The Case of B.S. v Spain', *Feminist Legal Studies* 21, pp. 195-204; La Barbera, M.C., Cruells López, M. (2019) 'Toward the Implementation of Intersectionality in the European Multilevel Legal Praxis: *B.S. v Spain*', *Law & Society Review* 53, pp. 1167-1201.

In academic writing, Mercat-Bruns[348] has suggested that pleading indirect discrimination could be a way of bypassing, in strategic litigation, the lack of success associated with intersectional claims. In particular, resorting to the concept of indirect discrimination does away with the requirement of comparability which is particularly demanding in the case of intersectional discrimination due to the lack of suitable comparators. Mercat-Bruns in this context discusses a judgment in which the French *Cour de Cassation* used the concept of indirect discrimination in order to deal with a case of intersectionality (i.e. an approach similar to that suggested by AG Kokott). The French case is described in more detail in the section on national legislation and case law (see E.II.4 below).

Fredman[349] has pointed to the approach taken under international human rights law[350] when arguing that the best way to deal with intersectional experiences may be to interpret the existing discrimination grounds expansively, so that intersectional experiences can be addressed by acknowledging that even within a single ground, multiple intersecting relationships of disadvantage can be addressed. According to Fredman, a 'capacious view' suggests that all aspects of an individual's identity should be taken into account even within one identity ground. As an example, Fredman mentions a woman who suffers intersectional disadvantage because she is an ethnic minority woman: even so, she is still subject to discrimination on the grounds that she is a woman. This, then, could be taken as a starting point in order to recognise that 'the more disadvantaged, the more she should attract protection'. Although it raises certain practical challenges, Fredman points out that incorporating this approach into EU law is supported by the flexible formulation of grounds in Article 21 CFR.

A further example from academic writing that may provide inspiration for national courts is the work by Schiek.[351] Schiek also argues that it is not necessary to wait for explicit EU law on intersectional discrimination, because the current law can be interpreted as encompassing intersectionality. Her suggestion is that EU discrimination law should be fundamentally reconceptualised around (overlapping) nodes of gender, race and disability (which Schiek sees as the key rationales for the ascription of difference, a process which is the basis of the ill addressed by discrimination law). These nodes, which have a centre as well as an orbit where other discrimination grounds may enter, are partially overlapping,[352] thus taking into account intersectionality. According to Schiek, a functional interpretation of EU discrimination law should focus on the useful effect of that law (*effet utile*) and on the recognition of the substantive concept of equality as its basis, both of which should lead to the recognition of intersectionality.

348 Mercat-Bruns, M. (2017) 'Multiple discrimination and intersectionality: issues of equality and liberty: Multiple discrimination and intersectionality', *International Social Science Journal* 67, p. 50 and following.
349 Fredman, S. (2016), *Intersectional Discrimination in EU gender equality and non-discrimination law*, p. 66 and following, and in particular p. 69 and following.
350 Fredman, S. (2016), p. 35 and following.
351 Schiek, D. (2018) 'On uses, mis-uses and non-uses of intersectionality before the Court of Justice (EU)', in particular as of p. 87.
352 See Schiek, D. (2018), p. 88 for the depiction of this system.

E National legislation and case law

I COMPARISON AMONG THE NATIONAL LAWS OF THE EU MEMBER STATES

A comparison of the national laws of the Member States shows that there are differences not only with respect to the legal definitions of the concept of indirect discrimination (discussed below under section 1) but also with respect to discrimination grounds covered (section 2) and the material scope of the legislation (touched upon briefly in section 3) Obviously, the latter two points have an important impact on the fields in which the concept of indirect discrimination can apply.

1 Definitions of indirect discrimination

As stated previously, both Directive 2000/43 and Directive 2000/78 contain legal definitions of indirect discrimination. However, when implementing EU directives into national law, the Member States are not obliged to use the precise wording of the directives. Under Article 288 TFEU, directives are binding on the Member States to whom they are addressed 'as to the result to be achieved [...] but shall leave to the national authorities the choice of form and methods'. Accordingly, the wording of the national legislation implementing a given directive may differ from that of EU law and may also differ among the various Member States. The national definitions of indirect discrimination in the fields of Directives 2000/43 and 2000/78 are a case in point. Indeed, the tables of the definition of indirect discrimination in the national law that can be found in the annex to this report show that quite a few Member States have chosen to use language that differs from that in the two directives.

Some differences appear to be merely semantic, at least in practice. For example, both Belgium and the Netherlands use the term 'distinction', rather than 'discrimination'. As is helpfully explained by the Dutch expert: 'Dutch equal treatment legislation uses the term "distinction" (*onderscheid*) rather than discrimination. The term "discrimination" (*discriminatie*) is used for distinctions for which no justification has been found to exist. Substantively there is no difference with the concept of indirect discrimination in EU law.'

Another example concerns Spanish law. Whilst the Directives refer to 'an apparently neutral provision, criterion or practice', Spanish law is more specific and lists 'a legal or regulatory provision, a clause in an agreement or contract, an individual agreement, a unilateral decision, a criterion of practice, or an environment, product or service'. Seeing as the terms 'provision, criterion or practice' still appear, this will be unproblematic as long as the provision is not interpreted as covering only the specific measures listed. Also, the Spanish law uses the singular 'person' instead of 'persons'. However, the Spanish expert states that the national case law is in line with that of the CJEU.[353]

A third example is the definition of indirect discrimination in Hungary, which does not explicitly refer to the 'apparently neutral' nature of the measure – a decisive element of the definition of indirect discrimination – but instead refers to 'a provision not deemed as direct discrimination and ostensibly meeting the requirement of equal treatment'. However, case law indicates that this definition is in fact understood as referring to apparently (ostensibly) neutral measures.[354]

Other aspects, however, do concern the substance of the definitions. One difference that can be observed quite widely throughout the national legislation of the various Member States concerns the reference to the discrimination ground. It will be remembered that Article 2(2)(b) of Directive 2000/78 requires that the disadvantage is to 'persons having a *particular* religion or belief, a *particular* disability, a *particular*

353 E.g. Spain, Constitutional Court, Judgment 69/2007, 16 April 2007, as well as Judgment 1/2021, 25 January 2021.

354 E.g. Hungary, Metropolitan Administrative and Labour Court, Decision 6.K.33.048/2015/17, 25 January 2016. According to the national expert, the court stated that 'it is sufficient that, although using neutral criteria not based on the protected characteristic, it has the effect of placing particularly persons possessing that characteristic at a disadvantage'.

age, or a *particular* sexual orientation' (emphasis added), although the Court in its case law does not appear to insist on this equally for all grounds. It will also be remembered that the Court has interpreted Article 2(2)(b) of Directive 2000/43 in the same way, even though the word 'particular' does not appear in that provision. It was also seen that insistence on this element by the Court has a limiting effect on the reach of the concept of indirect discrimination (see C.III.2.b above).

However, the tables of the definition of indirect discrimination in the annex to this report show that many Member States omit the word 'particular' in their definitions, though some of them do it only for some discrimination grounds and not for others. Instead of the wording of the Directive, they use broader terminology such as 'persons characterised by one of the protected grounds'. In fact, it may be argued that in such cases there is no concern about compliance with Union law, even where such a definition is interpreted by the CJEU in a broader manner than that of EU law. Instead, as is noted by the Slovakian expert, it may be argued that the national law provides for more protection against discrimination than does EU law, thereby extending the minimum protection provided by Union law, in line with Article 8(1) of Directive 2000/78 (and, presumably also with broader European human and international rights law).

In contrast, national definitions that use language such as 'treatment of a person on one of the grounds covered by the law' might be more problematic if seen in the light of the CJEU judgment in *Nikolova.* In that case, the CJEU held that the then existing definition of indirect discrimination under Bulgarian law was wrong. Under that definition, indirect discrimination was said to occur 'where, on the basis of characteristics mentioned in paragraph 1, one person is placed in a less favourable position compared with other persons by an apparently neutral provision, criterion or practice, unless that provision, criterion or practice is objectively justified having regard to a legitimate aim and the means of achieving that aim are appropriate and necessary'. The Court pointed out that where a measure that gives rise to a difference in treatment has been introduced for reasons relating to racial or ethnic origin, that measure must be classified as direct discrimination. In contrast, indirect discrimination does not require the measure at issue to be based on reasons of that type. Rather, it is sufficient that, although using neutral criteria not based on the protected characteristic, the measure has the effect of placing particularly persons possessing the characteristic in question at a disadvantage.[355]

In other words, the Court in this decision equates terminology such as 'on the basis of' a given characteristic with 'for reasons of' such a characteristic, which it sees as being part of the concept of direct discrimination. Conversely, for indirect discrimination the Court emphasises the *effect* of the measure in question. As a result, the Court does not approve of a definition of the latter concept that contains elements such as 'on the basis of' a given characteristic, even if the definition does mention the apparent neutrality of the measure. Presumably, existing national definitions that go in a similar direction as did the former definition in Bulgaria suffer from the same shortcoming. As for the Bulgarian definition, it was amended following the *Nikolova* decision and now refers to persons who 'suffer less favourable treatment or are placed at a particular disadvantage deriving from an apparently neutral provision, criterion or practice' (although the Bulgarian expert notes that the new definition has added other elements that may not help the clarity of the definition).

Differences in national definitions as compared to the definitions in Directives 2000/43 and 2000/78 may also relate to the part on justification. For example, Article 2(2)(b) of the Greek Equal Treatment Law 4443/2016 states that there is 'no indirect discrimination if the provision, criterion or practice is objectively justified by a legitimate aim and the means for accomplishing this aim are appropriate and necessary, if the measures taken are necessary for maintaining public security, ensuring public order, preventing the commission of crimes, protecting health, the rights and freedoms of others or when [the measures] are taken in favour of people with disability and chronic illness, in accordance with Article 6(5) of the Constitution and Article 5 of the present law'. This goes beyond the text of the definition of indirect

355 CJEU, Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia (third parties: Anelia Nikolova, Darzhavna Komisia za energiyno i vodno regulirane)*, 16 July 2015, ECLI:EU:C:2015:480 (Grand Chamber), paragraphs 95 and 96.

discrimination in Article 2(2)(b) of the two Directives. However, it must be remembered that indirect discrimination can be justified not only on the basis of objective justification grounds, as mentioned in the definitions, but also on the basis of statutory grounds. For Directive 2000/78, these include public security, public order, public health and the protection of the rights of others (Article 2(5)). To that extent, the Greek definition is simply putting two levels of justification in one text, without actually adding to EU law. Conversely, no such derogation grounds appear in Directive 2000/43. Here, additional justification grounds are acceptable only where they fit within the concept of objective justification.

Overall, it is important to note that whilst the definition of indirect discrimination under Directives 2000/43 and 2000/78 leaves some room for their implementation on the level of national law, the Member States remain obliged to observe the substance of the definition as far as the minimum protection set in Union law is concerned. Conversely, the Member States may legislate in such a manner that a higher degree of protection is achieved on the level of the national law, including in respect to justification (see C.V above).

2 Discrimination grounds covered

Directives 2000/43 and 2000/78 contain closed lists of discrimination grounds. A comparison of national legislation and case law shows that the Member States use different approaches in dealing with this situation. Some Member States have added more grounds or their legislation contains an open list, which allows additions notably through case law. In other Member States, additional grounds have been – so to speak – integrated into grounds mentioned in the two directives. A comparative analysis by Chopin and Germaine provides useful tables on the grounds covered by national law.[356]

a) Adding grounds

Adding discrimination grounds on the level of national law that implements Directives 2000/43 and 2000/78 is perfectly possible. In fact, as far as such additional grounds are concerned, the Member States are simply acting outside the field of the two Directives.

For example, some Member States have added grounds such as gender status, gender or transgender identity and expression, and further sex or gender characteristics (e.g. Croatia, Denmark, Greece, Malta, Slovakia, Slovenia and Sweden) – all of them grounds that are particularly important for groups of persons who lack encompassing protection under Union law in its present state.[357]

Three examples of particularly long lists of discrimination grounds will be mentioned at this point. First, in addition to the grounds covered in Directives 2000/43 and 2000/78, Slovakian law lists affiliation with a nationality, marital status and family status, colour of skin, language, political or other opinion, national or social origin, property lineage/gender or other status, the reason of reporting criminality or other anti-social activity contained in section 2(1) of the Anti-Discrimination Act. Secondly, French law adds mores, gender identity, origin, belonging, physical appearance, place of residence, banking residence, last name, family situation, trade union activities, political opinions, health, loss of autonomy, genetic characteristics, capacity to express oneself in a language other than French and economic vulnerability. Thirdly, Hungarian law adds colour of skin, nationality (though not in the sense of citizenship), belonging to a national minority, mother tongue, health condition, political or other opinion, family status, paternity, sexual orientation, gender identity, social origin, financial status, part-time nature of employment, legal

356 Chopin, I., Germaine, C. (2022) *A comparative analysis of non-discrimination law in Europe 2021. The 27 EU Member States, Albania, Iceland, Liechtenstein, Montenegro, North Macedonia, Norway, Serbia, Turkey and the United Kingdom compared,* European network of legal experts in gender equality and non-discrimination, Luxembourg: Publications Office of the European Union, as of p. 11.

357 Only for transgender identity is there limited protection under current CJEU sex equality case law; see Van den Brink, M., Dunne, P. (2018) *Trans and intersex equality rights in Europe – a comparative analysis*, European network of legal experts in gender equality and non-discrimination, Luxembourg: Office for Official Publications of the European Union.

relationship or other legal relationship relating to employment or fixed period thereof, belonging to an interest representation organisation, other situation, attribution or condition of a person or group.

Additions to the list of discrimination grounds are important in practice as acts based on such additional grounds will, under national law, amount to direct discrimination, which is overall a stronger concept than that of indirect discrimination.

In practice, how the law of a given Member State deals with a ground that is not explicitly mentioned in Directives 2000/43 and 2000/78 will depend on the wording of the national law, whether by adding it to the national list or in another manner, as well as on the national case law. This is illustrated with reference to nationality and trade union membership below.

b) Nationality

Nationality as a discrimination ground is explicitly excluded from Directive 2000/78 through Article 3(2). Instead, it is covered by Article 18 TFEU and by a number of specific prohibitions that apply in particular areas of EU law, including the economic law on the internal market where a cross-border element is normally required.

In some EU Member States (Belgium, Bulgaria, Czechia, Finland, Luxembourg, the Netherlands, Poland, Portugal, Romania) there is national social law (which applies independently of any cross-border element) that lists nationality explicitly as a prohibited discrimination ground. Alternatively, the national law may include nationality in the concept of racial discrimination. For example, under Irish law, different treatment on account of race means differences in race, colour, nationality or ethnic or national origins. In other words, Irish law in this respect distinguishes between a number of different elements that are related to race and the use of which may, by themselves, lead to racial discrimination. These elements also include nationality, in the Irish case law referred to as 'the nationality element of the race ground'. Clearly, such an approach is broader and more favourable for the victims of alleged discrimination than the approach used by the CJEU in case law such as *Jyske Finans* (see C.III.2.b above).

An example from Ireland involving indirect racial discrimination related to national origins is provided by a case involving a Pakistani national who applied for a learner driver licence so that he could use a car for his work (which was that of a delivery man).[358] This was refused with the argument that, as a non-EU/EEA/Swiss citizen, he needed particular documentation proving normal residence, which was impossible for the complainant. The documentation that the applicant had supplied was not sufficient (he had submitted his temporary residence certificate, a public services card, a copy of his passport and his permission from the Minister for Justice to access the labour market, which included his address). The authorities argued that normal residence was required in order to ensure that the integrity of the process of issuing and renewing driving licences is safeguarded by a robust verification process, particularly given the continuously evolving nature of threats to the security and integrity of the common driving licence, such as theft and forgery and other associated security concerns. The complainant maintained that these rules put non-Irish/EU/EEA/Swiss nationals – and, in particular, that cohort of such foreign nationals who are in the international protection system – at a particular disadvantage. This was accepted by the Irish Workplace Relations Commission (WRC),[359] which further found that the objective justification argument advanced by the respondent was weak, since the complainant had proved his identity beyond any degree of doubt. The WRC found that the respondent had engaged in indirect discrimination on the race ground against the complainant.

358 Ireland, Workplace Relations Commission, *An Asylum Seeker v A Government Agency*, ADJ-00017832, 20 November 2019.

359 According to its website, the WRC 'assumes the roles and functions previously carried out by the National Employment Rights Authority (NERA), Equality Tribunal (ET), Labour Relations Commission (LRC), Rights Commissioners Service (RCS), and the first-instance (Complaints and Referrals) functions of the Employment Appeals Tribunal (EAT)'.

Similarly, under Irish law, rules or practices related to language may indirectly lead to discrimination under the nationality element of the race ground. An illustrative example is provided by another Irish case.[360] The case concerned a grievance process within a company where the complainant, a Latvian national, sought to use an English language interpreter in meetings with the respondent. Her employer continually denied the request, arguing that the complainant had a sufficient command of the English language to proceed without an interpreter. The court found that the prohibition on the attendance of an interpreter in a grievance investigation is a provision, criterion or practice in relation to employment, which puts persons whose proficiency in English is limited, at a disadvantage. It added that it is self-evident that persons who are not nationals of an English-speaking country are significantly more likely to have limited proficiency in English than those of a nationality where English is their first language. The court did not accept the justification brought forward by the employer, which was the need to preserve the integrity of its agreed grievance procedure. The court could not accept that any procedures could be so inflexible as not to allow for translation services where they may be required and it concluded that the respondent's practice was wholly disproportionate to any perceived need to adhere strictly to the agreed procedures and was not therefore objectively justified.

c) Trade union membership

There are EU Member States (Belgium, Croatia, Finland, France, Lithuania) that include trade union membership, activity or opinion as a prohibited discrimination ground.

An example involving indirect discrimination on grounds of trade union membership is provided by a Lithuanian case that concerned the length of holidays of workers.[361] Under a collective agreement between the employer and the trade union, employees who were members of the trade union were granted only 27 working days of extended annual leave, extendable by up to two days where an employee had an uninterrupted length of service of 15 years. Other employees were given 30 days, regardless of their length of service. The Supreme Court of Lithuania found the rule applied by the employer to the trade unionist days of leave to be nominally neutral but with a negative effect on the rights of those employees who had worked for less than 15 years. As this negative impact was associated with trade union membership, the court found indirect discrimination against unionised workers (because of their trade union membership). A comment by a Lithuanian practitioner summarises the court's approach as follows:[362] 'The Supreme Court of Lithuania found that the situation in the case at issue met the criteria of indirect discrimination: the employer's rule on the number of days of leave was nominally neutral, but had a negative impact on the rights of some employees (employees with less than 15 years of work experience), and [...] this negative impact was linked to trade union membership.'

In other Member States, where trade union membership is not a recognised discrimination ground by itself, it may be possible to link it to another, recognised ground. For an example, consider an Italian case concerning the hiring practice of the company Fiat, which allegedly excluded members of a particular trade union.[363] The employer argued that workers were recruited in an impartial way and through objective criteria, without any discrimination. However, no worker who was a member of a particular trade union was employed. Statistics showed that the chances were only one in 10 million that this had happened by mere coincidence and not as a consequence of a deliberate targeting of those workers who had most strongly contested Fiat's new industrial strategy. The national court found that the disadvantageous treatment was due to trade union membership and as such amounted to indirect discrimination on grounds of belief ('*convinzioni personali*', literally 'personal convictions').

360 Ireland, Labour Court, *Boxmore Plastics v Zimareva*, EDA 1732, 30 November 2017.
361 Lithuania, Supreme Court, *VšĮ Greitosios medicinos pagalbos stoties darbuotojų profesinės sąjunga (Emergency Medical Service Station Trade Union) v VšĮ Greitosios medicinos pagalbos stotis (Public Institution Emergency Medical Service Station)*, e3K-3-227-684/2021, 26 August 2021.
362 Jončas, D. (2021), 'Supreme Court of Lithuania rules on indirect discrimination at work', blog post, 6 October 2021.
363 Italy, Court of Rome, *FIOM CGIL v Fiat, Fabbrica Italia,* 19 June 2012. A similar case is that of the Italian Supreme Court, *S.L.A.I. COBAS v F.C.A. ITALY S.P.A.*, 2 January 2020 no. 2.

These examples show that the Member States' use of their freedom of action within the minimum harmonisation under Directives 2000/43 and 2000/78 will result in more protection for victims of discrimination.

3 The material scope of national law

The same is true where the Member States go beyond the limited material scope of Directives 2000/43 and 2000/78 by adding more fields in which the prohibition of discrimination applies. Indeed, the tables on the scope of the national legislation in the annex to this report indicate that that is quite often the case, notably for the discrimination grounds covered by Directive 2000/78 where national law may go beyond mere employment matters and also include fields such as education or services. For more detailed information, the reader should refer to annex I and annex II. Again, opting for a broader approach in terms of material scope is perfectly possible as the Member States then are acting outside the field of Union law. Indeed, in many cases providing for a broader material scope of the national law will be required under international human rights law.

Adding to the material scope beyond that listed in Directives 2000/43 and 2000/78 may lead to interesting national case law, concerning cases such as that in Denmark of a member of a choir who has a disability who used to sit during performances and rehearsals and who then was confronted with a new rule that required that the choir members stand on such occasions,[364] or the case of persons with dyslexia in Sweden who normally used assistance devices during their studies but were prohibited from using them in national exams.[365] Further examples will be discussed in more detail in the next chapter of this report which provides case studies of national case law.

II NATIONAL CASE LAW: PROBLEMS AND GOOD PRACTICES

Several national experts report various types of difficulties reflected in the national case law on direct and indirect discrimination. Some examples are given below. It is important that the reader keeps in mind that difficulties are by no means limited to the countries indicated in these examples. Indeed, the general impression is that the concept of indirect discrimination and its delimitation in respect of direct discrimination are very often not fully understood and that in particular the distinction between direct and indirect discrimination presents difficulties for the national courts.

1 Direct or indirect discrimination?

a) Lack of indirect discrimination case law, unclear and confusing approaches

As is noted by the Romanian national expert, in countries where the national law contains a long list of explicit discrimination grounds it is not surprising that there will be more findings of direct rather than of indirect discrimination. But even so, it is strange that there should be Member States where there appears

364 Denmark, Board of Equal Treatment, Decision No. 9150, of 20 February 2020. The Board of Equal Treatment found *prima facie* discrimination but the held that the new rule was objectively justified by the goal of securing the quality of the choir's singing. The national expert notes that the case dealt with a situation outside the labour market and was adjudicated according to a Danish act that does not include a duty to provide reasonable accommodation. In the view of this expert, this finding is not satisfactory.

365 Sweden, Svea Appeal Court, *SL v Huddinge Municipality*, Cases FT 8377-19, 13 March 2020; Skåne and Blekinge Appeal Court, *LK v Malmö Municipality*, Case FT 3697-19, 17 June 2020, and Göta Appeal Court, *Örebro Municipality v HD*, Case FT 3960-19, 24 August 2020; see also https://www.equalitylaw.eu/downloads/5493-sweden-country-report-non-discrimination-2021-1-61-mb, p. 108. Both the district courts and the appeals courts in charge of these cases agreed that there was *prima facie* indirect discrimination. However, only one district court considered that there was a lack of reasonable accommodation and thus indeed indirect discrimination. The appeals courts in all three cases found the disadvantage objectively justified. The national expert notes critically that, while disregarding the assertions of experts to the contrary, the courts essentially assumed that the legitimate purpose of the guidelines cannot be achieved in any other manner. As the expert notes: there was simply no actual examination of proportionality.

to be little or even no case law on indirect discrimination that would fall under Directives 2000/43 and 2000/78 or no findings of such discrimination in courts (for example, Austria, Croatia, Estonia, Greece, Luxembourg, Malta). Obviously, this raises questions regarding the application of the concept in practice. Is it really being taken seriously?

Several national experts note that (some) domestic courts seem to have problems in identifying differences between direct and indirect discrimination; some examples are outlined here. The Slovak expert states that in most cases the domestic courts simply find a violation of the principle of equal treatment without specifying the form of discrimination. The Dutch expert mentions case law where the court refers to both direct and indirect discrimination and different lines of reasoning, without clarifying which of these was ultimately relevant for the case (the national expert speaks about a 'rather muddled approach').[366] The German expert describes a case where the German Federal Constitutional Court argued that it could be left open whether the measure in question led to direct discrimination on the ground of disability given the close connection of the use of a guide dog with disability (as argued before the court), because in any case it amounted to indirect discrimination on the ground of disability.[367] This approach is, obviously, not correct. The Romanian expert mentions cases where the national courts do find indirect discrimination but without indicating a discrimination ground.[368] Obviously, this latter approach is problematic because indirect discrimination is not a free-standing concept but is, on the contrary, always linked to a particular discrimination ground, if only in terms of its effect (i.e. indirectly).

The national experts further indicate that courts may apply the concept of indirect discrimination in cases where direct discrimination would have been the correct framework for analysis, even independently of the doctrine of an inextricable link of a formally neutral criterion with a prohibited discrimination ground, and vice versa. A case from Romania provides an illustration. It concerned the denial of access to a club to Roma persons, based on the lack of club membership cards. In order to apply for membership, potential clients were requested to supply a copy of their ID, a copy of the employment registry entry (official record of employment relations), the original of their criminal record document and a scan of their fingerprints. The Romanian National Council for Combating Discrimination (NCCD) held that while requesting a membership card for access to a club is justified as such, the conditions at issue disproportionally affect persons convicted for minor offences or persons who work as freelancers and do not have an employment registry entry. The NCCD found that the case at hand involved indirect discrimination on grounds of ethnic origin.[369] However, the national expert notes that, in practice, membership cards were not requested from non-Roma persons. If so, then this is the decisive fact in this case, which means that there was a clear difference in treatment directly based on ethnic origin.

b) The doctrine of the inextricable link: positive examples

The doctrine according to which the use of a formally neutral criterion that is inextricably linked to a prohibited discrimination grounds will lead to direct discrimination has found some, if apparently so far limited, reflection in national case law. The following two examples may serve as illustrations.

366 The Netherlands, Court of Appeal of The Hague, Case 200.225.063/01, 4 December 2018. The case concerned religion and education, and thus did not fall under Directive 2000/78 but fell under national law. It concerned a Muslim family whose parents complained because the class photos were taken at their children's school on the day of an Islamic holiday, as a result of which the children could not have their picture taken together with their classmates.

367 Germany, Federal Constitutional Court, 2 BvR 1005/1830, 30 January 2020. The case concerned healthcare and a person with disability, i.e. it did not fall under Directive 2000/78 but fell under national law. The person in question was a patient of a physiotherapist who needed a guide dog. To access the rooms of the physiotherapist, one could either use a staircase (which the dog could not climb) or pass through the waiting rooms of another medical practice. The patient was allowed to do the latter for several weeks accompanied by her dog. After some time, the patient also needed to use a wheelchair. At some point, the other medical practice prohibited the patient from crossing the practice with her dog, for alleged hygienic reasons.

368 Romania, National Council for Combating Discrimination, Decision 252, 22 September 2010. The case concerned the complaint by a person who used to work as the General Director of the Market Administration, and whose title and employment criteria were replaced two years after his hiring due to the fact that he had not done legal studies. The National Council for Combating Discrimination held that the apparently neutral criterion of having a legal education leads to indirect discrimination, without however indicating the protected ground.

369 Romania, National Council for Combating Discrimination, Decision 67, 19 May 2010.

The Netherlands Institute for Human Rights (NIHR)[370] held that a company offering car insurance for different insurance providers directly discriminated against a woman on the ground of race by refusing to consider her for insurance because she lived on a caravan site. The NIHR considered the fact of living on a caravan site to be so closely related to belonging to the group of Travellers that the case had to be analysed in the framework of direct discrimination.

The Irish Equality Tribunal determined that where a provision applies exclusively to members of a protected group, direct discrimination is the appropriate provision. One such case concerned a pupil with a learning disability who attended a special needs school (i.e. the case was outside the material scope of Directive 2000/78).[371] It was the school's policy to require that children attending special schools should be obliged to leave the school at the end of the school year in which they reach their 18th birthday. The complainant's mother claimed that her daughter would not be ready to leave the school at age 18. However, the option of an additional year was not automatically available to her, as distinct from students in mainstream education. The Equality Tribunal held that the requirement for students attending special schools to leave the school at the end of the year in which they reach 18 does not constitute 'an apparently neutral provision' within the meaning of the concept of indirect discrimination but rather is a provision that directly affects a specific category of persons, namely disabled students who attend special schools. Accordingly, the case had to be examined in the framework of direct discrimination on grounds of disability.

c) Discrimination and prejudice or stereotyping

Overall, prejudice and stereotypes do not appear to play a major role in the reasoning of national courts in discrimination cases.

A case from Belgium provides an example of good practice. It relates to an application for employment as a driver of an ambulance that was refused by the organisation in question. By mistake, the recruiting person sent an internal email to the applicant (who was not meant to receive it). This message stated explicitly that, among other persons, foreigners would not even be considered for the post, as such applications were doomed in advance to failure. As a result, the actual competences of such applicants were not even looked at. The reason subsequently relied on by the potential employer for this practice was the (alleged) lack in the case of foreigners of a perfect knowledge of the Flemish (Dutch) language, which knowledge was required by the law for the ambulance drivers in question. The court found that there was no valid reason for this attitude and that the refusal was, in fact, due to arbitrary exclusion based on preconceived ideas about persons of foreign origin ('*vooringenomen*', i.e. prejudiced). The court added that diversity in the workplace is crucial in a democratic society and that achieving it is only possible with a correct recruitment procedure that screens for competencies and not one that is based on stereotyping, racism and exclusion of certain people or groups of people. According to the court, the behaviour of the accused showed an anti-social attitude that cannot be tolerated.[372]

The Belgian national expert mentions this case as an example of *direct* discrimination on grounds of race or ethnic origin. At first sight, this might seem confusing since, if the legal requirement of language knowledge is taken as a starting point, the case involves a formally neutral criterion. However, the erroneously sent internal email made it abundantly clear that the real reason for the refusal to consider the application in question were prejudices of the recruiting persons towards applicants of foreign origin. In other words, the email served as the necessary proof for the discriminatory motives behind the action in question. Against that background, the case is a (rare) example of the application of the CJEU's doctrine about stereotypes that lead to direct discrimination on that ground.

370 The Netherlands, Netherlands Institute for Human Rights, 13 December 2019, Opinions 2019-130 and 2019-131.

371 Ireland, Equality Tribunal, *Mrs Cr (on behalf of her daughter Miss Cr) v The Minister for Education and Science*, DEC-S2009-051, 5 August 2009. See also Equality Tribunal, *Mrs Kn (on behalf of her son Mr Kn) and Others v The Minister for Education and Science*, DEC-S2009-050, 5 August 2009, para 6.12.

372 Belgium, East Flanders court of first instance, Ghent, *UNIA v N.B.*, 17 February 2021. The judgment was confirmed in substance on appeal.

d) The specific example of religious clothing

Perhaps not very surprisingly, the picture presented by national case law on employers' rules and actions with respect to religious clothing is very varied. Different approaches – direct vs. indirect discrimination, acceptance of objective justification vs. denial of its existence – abound. For example, the Austrian Supreme Court stated explicitly that discrimination on the basis of religious clothing is direct discrimination on the ground of religion, as religious clothing is not a neutral criterion.[373] Similarly, in Belgium the Brussels Labour Court found direct discrimination, arguing that the case at hand was different from *Achbita* because the non-hiring in the case before it was presumed to be motivated by the applicant's refusal to remove her veil, rather than by the rule reflecting the potential employer's policy of neutrality.[374] However, the usual approach in cases relating to religious clothing, whether they involve the non-hiring or the dismissal or a woman wearing the veil, is that of indirect discrimination, which in the end is often not found to exist due to an acceptance of objective justification.

To some extent, such differences in approach may perhaps be explained by the finding of Śledzińska-Simon,[375] according to which 'the current protection of freedom of religion and the protection against religious discrimination is based on a multilevel normative framework, which leaves a significant margin of discretion to "local" decision-makers'. Nevertheless, as discussed above, the CJEU has formulated a framework for distinguishing between direct and indirect discrimination on grounds of religion based on the nature of the rules in question and the manner in which they are applied.

At this point, it is worth mentioning an example of a useful approach, namely a Belgian case on the prohibition of Islamic swimwear for women in public swimming pools (again, a case that is outside the scope of Directive 2000/78).[376] The applicant in this case needed to swim for health reasons and she wished to wear a tight-fitting 'burkini'[377] made from swimwear material. However, she was refused access to the pool based on the rule that a 'swimming costume' must be worn. Swimming costumes were defined as follows: '[F]or men tightly fitting swimming trunks, for women a swimming costume or bikini. No pockets or zips are allowed in these swimming costumes. Any other form of clothing such as underwear, bermudas, shorts, T-shirts, dresses, skirts, burkinis etc. are not permitted for hygienic/ecological reasons.' The Ghent Appeals Court found that this provision creates a difference in treatment directly on grounds of religion between on the one hand, Muslim women who wish to wear a covering swimsuit/burkini for religious reasons and, on the other hand, female swimmers who do not consider themselves bound by such a religious rule. The court noted that in the enumeration of prohibited clothing, the burkini is the only item that is made of swimming costume material. The court did find the various justification grounds forwarded by the swimming pool, such as hygiene and security (namely an allegedly increased risk of drowning and increased difficulties for life guards in saving swimmers), convincing. Interestingly, the Ghent Appeals Court stated that where the explicit mention of 'burkinis' is merely an example of loose-fitting and covering swimwear (i.e. where it is not a category of its own), the analysis will have to turn to indirect discrimination.

For the sake of completeness, it should be added that there are also Belgian cases with a less rigorous, or even opposite, approach.[378] At the time of writing, there is also a fierce legal debate on the issue of

373 Austria, Supreme Court, Case OGH 9 Ob A 117/15v, 25 May 2006.
374 Belgium, Labour Court of Brussels, *UNIA and others v STIB*, 3 May 2021.
375 Śledzińska-Simon, A. (2019), 'Unveiling the Culture of Justification in the European Union. Religious Clothing and the Proportionality Review', in: Belavusau, U., Henrard, K. (eds) (2019) *EU Anti-Discrimination Law Beyond Gender*, Oxford: Hart Publishing, p. 224 and following.
376 Belgium, Court of Appeal of Ghent, *Autonoon Gemeentebedrijf (...) v H.S.*, 24 June 2021.
377 See, e.g. the opinion piece by Stephanos Stavros, 'The human rights aspect of Grenoble's 'burkini' controversy', *EUobserver* 4 July 2022.
378 E.g. Belgium, Court of Appeal of Antwerp, *A. and Y. v (...)*, 23 November 2020. With respect to different policies applied in Belgium, see Heirwegh, T., Van de Graaf, C. (2019) 'The local swimming pool as a space of rights contestation – an analysis of 'burkini' policies in Belgian local public swimming pools', *The Journal of Legal Pluralism and Unofficial Law* 51:2.

Islamic swimwear in France.[379] In this writer's opinion, the Ghent case should be seen as an example of good practice.

2 Indirect discrimination: evidence to establish a particular disadvantage

a) Means of evidence

The reports by the national experts show that the national law of the Member States allows for the use of different types of evidence with respect to the requirements of proof in view of a *prima facie* finding of indirect discrimination, including both evidence through the use of statistics and other approaches.

Mulder[380] notes in the context of sex equality law that national approaches differ widely with respect to statistical evidence. According to her findings, few Member States consider statistical evidence in detail.

An illustrative example for a useful approach in this respect is Ireland. Section 3(3A) of the Irish Equal Status Acts 2000-2018 provides that statistics are admissible for the purpose of determining whether discrimination has occurred. At the same time, statistics are only one of several different means for these purposes and they are not always necessary. In the foundational case on this issue, *NBK Designs v Inoue*,[381] the Irish Labour Court stated that:

> '[I]t is most undesirable that, in all cases of indirect discrimination, elaborate statistical evidence should be required before the case can be found proved. The time and expense involved in preparing and proving statistical evidence can be enormous, as experience in the United States has demonstrated. It is not good policy to require such evidence to be put forward unless it is clear that there is an issue as to whether the requirements of Section 1(1)(b) are satisfied. [...].
>
> It would be alien to the ethos of this Court to oblige parties to undertake the inconvenience and expense involved in producing elaborate statistical evidence to prove matters which are obvious to the members of the Court by drawing on their own knowledge and experience.
>
> Whilst there are many cases in which the unequal effect of a provision can be seriously put in issue and the true position can only be established by elaborate statistical evidence, the Court is satisfied that this is not such a case.'

So, statistical evidence is not necessary under Irish law in cases where matters are obvious. A particularly clear example for such a finding is that 'it is obvious, and need not be proved statistically, that Travellers are far more likely than non-Travellers to live on halting sites.'[382]

Further, there is also Irish case law where qualitative research was admitted as evidence, such as research conducted by an NGO into computer usage by older people[383] or a legal textbook as support for the contention that a given provision placed men at a particular disadvantage.[384]

379 The court explains that the burkini was designed by the Australian designer A.Z., who developed the swimwear in 2003 and gave it the names 'burkini' and 'burqini' and registered it as a trademark. The burkini is designed according to Islamic rules and should encourage Muslim girls to participate in sports (www.burqini.com). The court also notes that the sports brand Nike offers a burkini called 'Nike Victory'.
380 Mulder, J. (2021) *Indirect sex discrimination in employment*, p. 65.
381 Ireland, Labour Court, *NBK Designs v Inoue*, EED0212, 25 November 2002.
382 Ireland, Equality Tribunal, *McDonagh v Navan Hire Limited*, DEC-S2004-017, 6 February 2004.
383 Ireland, Equality Tribunal, *Martin v Esplanade Hotel*, DEC-S2010-034.
384 Ireland, Equality Tribunal, *Mr A v Community Welfare Service, Department of Social Protection,* DECS2013-010, 11 October 2013.

With respect to the practicalities around statistical evidence, the French *Méthode Clerc* appears useful. It has been in existence in France since the 1990s and is recognised notably by the Social Chamber of the French Court of Cassation.[385] It is an approach based on access to evidence that is applied in three steps:

- A panel of comparator employees is defined, i.e. a list of names of co-workers hired at the same time and under the same conditions as the employee who complains of discrimination.
- From the data obtained, graphs are produced showing the years and the salary amounts or coefficients and resulting in promotion curves for each of the employees in the panel. Where the information needed is not available, French labour law makes it possible to request disclosure of payslips in court.
- Based on this information, a comparison of the data can be made with the situation of the employee who has allegedly been discriminated against.[386]

As explained by the French national expert to the author of this report, confidentiality and data protection do not present a bar to this approach, since French law on data protection creates an exception relating to the courts' access to evidence (Article 6 II and 31 (I) of the Data Protection Law 78-17 of 6 January 1978). On the level of Union law, Article 9(2)(b) and (f) of the General Data Protection Regulation 2016/679 (GDPR)[387] provides that personal data can be used in the context of administrative or judicial proceedings pursuant to the defence or exercise of a legal right,[388] provided that the safeguards under Article 89(1) GDPR are put in place in view of the principle of data minimisation (e.g. through the anonymisation of data). As noted by the Lithuanian expert, the GDPR sets certain limits but the French example illustrates that even so a useful approach can be developed.

With respect to the relevance of statistical evidence, the approach used in the Netherlands should be mentioned. When conducting statistical analysis, the Dutch Equality Body applies a two-step approach: first, it carries out a correlation test to determine the correlation between the measure said to cause the disadvantage and the characteristic linked to the discrimination ground; secondly, if a sufficiently strong correlation is found, a significance test is applied to test the significance of the correlation.

For example, a lecturer at the University of Maastricht complained about the amount of the allowance for moving expenses, which is much higher for employees who have their own household than for those who do not.[389] The lecturer, who lived with his parents, argued that unmarried employees and employees under 30 years of age are especially likely to be eligible for the low allowance and are particularly affected by the criterion set by the university, namely that they must have their own household. He therefore argued that there is indirect discrimination on grounds of marital status and age. The NIHR found that the overview of employees who received an allowance for other relocation expenses in 2019 showed that there is a correlation between age and the receipt of a high or low allowance, and that this correlation was statistically significant. The NIHR found that employees under 30 were particularly affected, as they more often received a low allowance. This amounted to indirect discrimination on the grounds of age.

385 France, case law since the *Fluchère, Dick and CFDT* case, *Cour de Cassation*, Cass. soc., 28 March 2000, no 97-45258.
386 The method is described (in French) here: https://droits.nvo.fr/veille/contre-les-discriminations-utiliser-la-methode-clerc/.
387 Regulation 2016/679/EU on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119/1. The relevant parts of Article 9 GDPR (Processing of special categories of personal data) read as follows: '1. Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation shall be prohibited. 2. Paragraph 1 shall not apply if one of the following applies: [...] (b) processing is necessary for the purposes of carrying out the obligations and exercising specific rights of the controller or of the data subject in the field of employment and social security and social protection law in so far as it is authorised by Union or Member State law or a collective agreement pursuant to Member State law providing for appropriate safeguards for the fundamental rights and the interests of the data subject; [...] (f) processing is necessary for the establishment, exercise or defence of legal claims or whenever courts are acting in their judicial capacity; [...].'
388 For the current state of case law, see the *Airbus* case: France, *Cour de Cassation*, Cass. Soc., no 1015873, 15 December 2011.
389 The Netherlands, Netherlands Institute for Human Rights, opinion 2020-84, 9 October 2020.

b) *The specific example of discrimination against Roma people*

The national experts report many cases relating to discrimination against Roma persons, including cases about segregation in schools, where statistics play an important role. At this point, two examples from Romania will be mentioned, against the background of the approach of the European Court of Human Rights.

The Romanian case in question concerned the criteria for eligibility for social housing in certain Romanian communities.[390] In 2016, the Romanian National Council for Combating Discrimination (NCCD) initiated an *ex officio* investigation into several mayors and county councils with respect to the criteria for eligibility for social housing in those communities. The communities used a system of points, with points for education (the higher the level education, the more points; this was a priority criterion), the income and the number of children of the persons seeking social housing. The Reghin municipality challenged the NCCD decision that found indirect discrimination on grounds of ethnic origin. In 2017, the Appeals Court confirmed the finding of discrimination (a further appeal by the Reghin municipality to the High Court was rejected on procedural grounds in 2020).

Particularly interesting for the purposes of this report is the fact that the Appeals Court took into consideration statistical data provided by the NCCD showing that more than 50 % of the Roma population did not graduate, compared to 15 % of persons of other ethnic groups, and also statistical data on the living conditions of Roma people showing that more than 50 % live in spaces of less than 4sqm for a person, as compared to 10 % in the case of other ethnic groups. Based on these figures, the NCCD noted that the criterion of the level of education limits access to social housing for persons with a lower level of education and that based on the statistical data, granting an increasing number of points proportionally with higher levels of education leads to negative consequences in relation to the Roma community, amounting to indirect discrimination on grounds of ethnic origin. For more on this case, see section 3 below, on objective justification.

Statistics are often relied on in cases concerning Roma persons, as well as in cases concerning segregation. One example is the *Dumbrăveni Theoretical High School* case,[391] which was brought by a Roma NGO to the Romanian NCCD. The NGO complained about the practice of transferring Roma pupils from the Theoretical High School to a special school, leading to a situation where almost 90 % of the pupils attending the special school were Roma. The high school had instituted a transfer procedure for pupils who failed to attain the grades required to pass a class for more than two or three years in succession and who were evaluated for transfer by a special commission established by law at the level of the local general directorate for the protection of the child and for social assistance. The special commission decided whether the pupils had intellectual disabilities and whether they needed special education. In its decision, the NCCD concluded that the procedure for transferring children to the special school in practice led to discriminatory outcomes, since decisions were ultimately taken based not on disability but rather on the socioeconomic needs of the pupils (children with disabilities were given certain benefits in food, transportation and financial support). The NCCD found that the case before it amounted to indirect discrimination on grounds of ethnic origin and recommended that the Ministry of Education take all 'measures necessary in order to ensure implementation of the principle of equal opportunities in schools, and to redress the discriminatory treatment of Roma pupils who had been transferred from regular schools to special schools based on socio-economic needs' (and not based on disability).

With respect to the finding of discrimination based on statistics, the NCCD in the *Dumbrăveni Theoretical High School* case referred to the ECtHR decision in *D.H. and Others v the Czech Republic (Ostrava)*, already mentioned earlier in this report in the context of international human rights law (see A.II above). That

390 Romania, National Council for Combating Discrimination, Decision 511, 20 July 2016, and Târgu Mureș Court of Appeal, Decision 30/2017, 17 March 2017.
391 Romania, National Council for Combating Discrimination, Decision 733, 11 June 2008.

case is important in this context because it illustrates not only how the use of statistics can be relevant in showing that there is apparent indirect discrimination, but also that the courts' attitude to such proof is important. In the *Ostrava* case, 18 Roma school children from the Czech city of Ostrava complained about the fact that the percentage of Roma children placed in special schools for children with learning difficulties in the Czech Republic was much higher than that of other children. Children were placed in special schools based on the results of a test of intellectual ability administered by a psycho-pedagogic assessment and advisory centre. The claimants argued that the authorities abused the school system to place disproportionately many Roma children in special schools where they would receive a lesser education. Indeed, the level of such special schools was considerably lower than that of regular schools.

The *D.H. and others v Czech Republic* case is characterised by the vast use of statistical data comparing numbers of Roma and non-Roma children in special and regular schools in Ostrava in particular, and in the Czech Republic in general. The statistics relied on had been collected by NGOs and consultancies, namely the European Roma Rights Centre, Interights and the Migration Policy Group, based on lengthy and detailed research carried out by these organisations.[392] The data showed that in Ostrava, Roma children were 27 times (!) more likely to be placed in special schools than other children. This led to the argument of a segregated school system involving indirect discrimination on grounds of racial origin. However, the action was unsuccessful before the Czech courts. In particular, the Constitutional Court held that it had no jurisdiction to consider statistical evidence. The action was also unsuccessful before a chamber of the Court of Human Rights in Strasbourg in 2006, but it did succeed before the same Court's Grand Chamber in 2007. The chamber had held that statistics are not by themselves sufficient to disclose a practice which could be classified as discriminatory. In academic writing, the chamber judgment was severely criticised because of its flawed approach to indirect discrimination and to statistical proof in particular.[393] In contrast, the Grand Chamber, after having referred to the practice of other courts and human rights bodies, including in particular the CJEU, found that 'when it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the prima facie evidence the applicant is required to produce'. Importantly, the Court added that '[t]his does not, however, mean that indirect discrimination cannot be proved without statistical evidence'.[394]

3 Indirect discrimination: objective justification

Various national experts note the importance of a proper analysis in the national case law in relation to the requirements of proportionality (as already noted in the context of some of the cases already mentioned). The following two cases are examples of a convincing analysis in that regard.

The first example is the Swedish *Western Union* case,[395] on indirect discrimination on grounds of ethnic origin. The case concerned the use of the money transfer service by two men with Muslim/Arabic names who wanted to send or receive money but whose names were confused with names on the international sanctions list. As a result of these checks, a large number of customers with Arabic or Muslim names had their transactions blocked or delayed. The case went to the district court, which held that there was *prima facie* indirect discrimination on grounds of ethnic origin and/or religion. In terms of objective justification, it was undisputed that Western Union's system of checking had a legitimate aim, given the EU law stating that no funds are to directly or indirectly be made available to persons on the sanctions list. However, the application of the system was found to lack in proportionality. The court found that through the use of relatively simple methods, such as asking about a person's birthday, the risk of freezing the transactions

392 See European Roma Rights Centre (ERRC), Interights, Migration Policy Group (MPG) (2004) *Strategic Litigation of Race Discrimination in Europe: From Principles to Practice*, p. 80.
393 See, e.g. Goodwin, M. (2006) '*D.H. and Others* v. *Czech Republic*: a major set-back for the development of non-discrimination norms in Europe', *German Law Journal*, 421-432.
394 ECtHR, *D.H. and Others*, 13 November 2007 (Application number 57325/00), paragraph 188.
395 Sweden, Stockholm Municipal District Court, *Equality Ombudsman vs Western Union,* Case T 9176-08, 13 April 2011.

of many innocent people could have been avoided. In fact, Western Union itself stated that 9 out of 10 transactions are allowed to proceed after a more thorough identity check is carried out.

The second example relates to the Romanian social housing case, that was discussed in the previous section in the context of statistics.[396] In that case the eligibility for social housing was determined based on a system of points for education (the higher the level of education, the more points), the number of children and income. In the appeals case, the Reghin municipality argued in terms of justification that the various criteria taken together amount to an affirmative action measure, stimulating social inclusion and professional inclusion. The court, however, did not find this convincing. It stated that while for other types of public housing prioritising higher levels of education may be useful as it might encourage education, in the case of *social* housing, such a criterion is not objectively justified (i.e. it is not an appropriate means). The municipality had also argued that deciding on the priority criteria for social housing falls within the margin of appreciation and the discretionary powers of the local authorities. In response to this the court stated that the right of appreciation of the public authorities does not entail the possibility of acting in an abusive, arbitrary manner, without legal justifications and escaping any oversight. Rather, the exercise of such powers is subject to the principle of proportionality.

4 Using indirect discrimination in order to deal with intersectionality

As mentioned earlier, it has been argued that the concept of indirect discrimination could and should be used in litigation on intersectional discrimination. As a notable example, Mercat-Bruns[397] mentions the decisions by the Paris Appeals Court and the French Court of Cassation in the *Dos Santos* case.[398]

The case concerned the employment conditions and the dismissal of a migrant household worker of illegal status in France. The woman concerned held the nationality of Cap Verde. She had been illegally hired by a French couple for childcare and housework for years. When the couple separated, she continued to be employed by both parents and she lived in a maid's room in the father's residence. At some point, her employment was terminated and she was asked to leave the accommodation. At issue in this case was what Mercat-Bruns describes as the special predicament of a certain number of illegal immigrant women: they suffer multiple disadvantages due to their sex, illegal status and employment as domestic workers dependent on their employer for both income and housing.

The Paris Appeals Court found indirect discrimination on the basis of origin. The court judged the situation of the claimant in the light of the collective agreement that applies in the case of regular employment and found that the claimant had in fact been employed full time for almost nine years. The court held that the couple had to pay the claimant outstanding wages and non-material damages. This judgment was subsequently upheld by the Court of Cassation. Mercat-Bruns notes that this court circumvented a number of difficulties involved in cases such as the one before it. Notably, the court did not let itself be stopped by the presumed lack of employment rights of an illegal worker. Instead, it followed the approach taken by the Paris Appeals Court, noting that the fact that the claimant was not allowed to make any claims on French territory meant that she was denied legal and contractual rights and that, consequently, she was at a 'total disadvantage' compared to domestic workers who benefit from the French labour legislation. Referring to the CJEU case of *Feryn*,[399] Mercat-Bruns concludes from this that in the same way that anti-discrimination law applies to recruitment practices prior to hiring and to hypothetical discrimination with no specific victim, it can be enforced in situations beyond the scope of an employment contract.

396 Romania, National Council for Combating Discrimination, Decision 511, 20 July 2016, and Târgu Mureș Court of Appeal, Decision 30/2017, 17 March 2017.
397 Mercat-Bruns, M. (2017) 'Multiple discrimination and intersectionality: issues of equality and liberty: Multiple discrimination and intersectionality', p. 50 and following.
398 France, *Cour de Cassation*, *Dos Santos,* Cass. soc., no 10-20765, 3 November 2011.
399 CJEU, Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, 10 July 2008, ECLI:EU:C:2008:397.

Importantly in the current context, the two courts recognised the special vulnerability of people suffering from different factors of exclusion by finding that the claimant's illegal status, a seemingly neutral characteristic creating a particular vulnerability, was the cause for an 'aggravated' indirect discrimination *('discrimination indirecte characterisée')*. Mercat-Bruns notes that the concept of indirect discrimination can be of advantage in situations of intersectional discrimination due to the fact that – distinct from direct discrimination – it does not presuppose a comparability of situations. In fact, the French Court of Cassation in the *Dos Santos* case stated explicitly that a finding of discrimination does not necessarily presuppose a comparison with the situation of (actual) other employees. As noted by Mercat-Bruns, this is a crucial element for cases of intersectionality where actual comparators are usually missing.

Conclusion

This report has shown that the concept of indirect discrimination has a firm place in modern international human rights law as well as in EU law. It is mentioned and legally defined in Directives 2000/43 and 2000/78, which are the focus of this report. These directives give expression to the general principle/Charter right of equality and non-discrimination and as such are part of a broader, multi-layered system of EU equality or non-discrimination law that provides a sophisticated framework for the protection of individual rights. Being part of the overall body of Union law, the two directives bind the Member States as a matter of the primacy of Union law (*Costa*),[400] including in relation to the prohibition of indirect discrimination.

In European Union law, the concept of indirect discrimination finds its origin in the case law of the Court of Justice that developed since the 1960s when the main aim of its inclusion in the understanding of the concept of discrimination was already to enhance the reach and the effectiveness of the prohibition of discrimination. The concept of indirect discrimination looks beyond mere appearances and instead focuses on the effect of a measure. Further, practice has shown that it is able to lay bare and to challenge, at least to a certain degree, structural and systematic disadvantage. Both elements indicate that the concept of indirect discrimination holds great potential – a potential, however, that still awaits its full realisation.

In 2007, Schiek[401] noted that the law on indirect discrimination is a complex area that was – at that time – far from being consolidated. Schiek also argued that it was difficult to know whether this law would truly take hold in all the national legal orders within the European Union. In 2021, Mulder in her report about indirect sex discrimination in employment comes to the sobering conclusion that indirect discrimination is often poorly understood or even ignored in the Member States.[402] According to Mulder, it 'seems fair to suggest that despite its long history, the potential of indirect sex discrimination to foster substantive gender equality has not yet been realised'. She adds that the reasons for this situation are complex and range from different socioeconomic, cultural, and historical factors within the Member States (some of which limit the relevance of EU non-discrimination law overall) to structural limitations within the concept itself.

This report confirms Mulder's findings, made with respect to the field of sex equality law, in the legally different context of Directives 2000/43 and 2000/78 and, thereby, the context of discrimination on the basis of race and ethnic origin, religion or belief, disability, age and sexual orientation. Here, too, there are elements in the Court's case law that are problematic and here, too, much remains to be done on the level of the Member States.

Mulder argues that improvements of the present deficient situation could be reached through a consistent, coherent and rigorous application of the concept, on the level of both the national courts of the Member States and of the Court of Justice.[403] In holding their national law to the standards of EU law, the national courts of the Member States will find guidance in CJEU case law, as discussed in this report. It is true that, often, the Court's modern case law may not indicate clearly what the outcome of a given case should be, limiting itself – in fact, in line with the nature of the preliminary ruling procedure – to the interpretation of the relevant Union law and leaving its application to the national courts. However, the Court's case law does set out the steps that the national court must take in judging a given case. Should a national court still have doubts about the meaning of Union law or about previous CJEU case law, it should consider a

400 CJEU, Case 6-64 *Flaminio Costa v E.N.E.L.*, 15 July 1964, ECLI:EU:C:1964:66.
401 Schiek, D. (2007) 'Indirect Discrimination', in: Schiek, D., Waddington, L., Bell, M. (eds) *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Oxford: Hart Publishing, p. 472.
402 Mulder, J. (2021) *Indirect sex discrimination in employment*, p. 123.
403 Mulder, J. (2021) *Indirect sex discrimination in employment*, p. 123 and following.

request for a preliminary ruling to the Court under Article 267 TFEU (and indeed, if it is the last instance in the case before it, it is obliged to do so).[404]

Admittedly, the complexity of the Court's case law in relation to indirect discrimination has increased over time. This is particularly true with respect to the delimitation between the concepts of direct and indirect discrimination, which appears to pose a particular challenge for the national courts and has led to confusing national case law. This is indeed a challenging field. But again, the Court does set out definitive criteria for judging whether a case must be analysed within the framework of direct discrimination or that of indirect discrimination, as discussed in this report. It is important that the national courts follow this line and provide for the higher degree of protection that comes with the concept of direct discrimination where that is called for in view of the facts of a given case.

Fortunately, there are interesting examples of good practice on the national level that may serve as inspiration for other Member States. In this context, it needs to be remembered that Directives 2000/43 and 2000/78 set minimum requirements only. In this context, the Member States are free and indeed encouraged to provide for a higher degree of protection from discrimination, for example by providing for fewer exceptions than EU law does or by making the proportionality test stricter. Outside the reach of the Directives, the Member States can and should broaden the protection against discrimination, for example by adding further discrimination grounds and by widening the material scope of their legislation. Indeed, in line with their obligations under international law, the Member States should make use of the freedom left to them by Union law in order to further realise the potential of the concept of indirect discrimination. Moreover, the prohibition of indirect discrimination can and should be backed up in the Member States with further legislative and non-legislative action. This may include measures to raise awareness in relation to the problem of indirect discrimination as well as measures to tackle the structural problems that are exposed through findings of indirect discrimination. The Member States' obligations under public international law to strive for transformative equality in order to fight discrimination acquire a particular meaning in this context.

404 For practical help on this matter, see Court of Justice of the European Union, Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, OJ 2019 C-3801/1.

Bibliography

CASE LAW

European Court of Human Rights

- *Case 'Relating to certain aspects of the laws on the use of languages in education in Belgium' v Belgium, 23 July 1968* (Applications nos. 1474/62, 1677/62, 1691/62, 1769/93, 1994/63, 2126/62)
- *Marckx v Belgium,* 13 June 1979 (Application no. 6833/74)
- *Thlimmenos v Greece*, 6 April 2000 (Application no. 34369/97)
- *Hugh Jordan v UK,* 4 May 2001 (Application no. 24746/94)
- *Hoogendijk v The Netherlands,* 6 January 2005 (Application no. 58641/00)
- *D.H. and others v Czech Republic,* 13 November 2007 (Application number 57325/00)
- *Oršuš and Others v Croatia,* 16 March 2010 (Application no. 15766/03)
- *B.S. v Spain,* 24 July 2012 (Application no. 47159/08)
- *De Trizio v Switzerland,* 2 February 2016 (Application no. 7186/09)
- *Biao v Denmark*, 24 May 2016 (Application no. 38590/10)
- *Lárusson v Iceland*, 31 May 2022 (Application no. 23077/19)

Court of Justice of the European Union

- Case 7-61 *Commission v Italy*, ECLI:EU:C:1961:31
- Case 6-64 *Flaminio Costa v E.N.E.L.*, ECLI:EU:C:1964:66
- Case 15-69 *Württembergische Milchverwertung-Südmilch AG v Salvatore Ugliola*, ECLI:EU:C:1969:46
- Case 20-71 *Luisa Sabbatini, née Bertoni, v Parliament*, ECLI:EU:C:1972:48
- Case 152-73 *Giovanni Maria Sotgiu v Deutsche Bundespost*, ECLI:EU:C:1974:13
- Case 96/80 *J.P. Jenkins v Kingsgate (Clothing Productions) Ltd.,* ECLI:EU:C:1981:80
- Case 113/80 *Commission v Ireland*, ECLI:EU:C:1981:139
- Case 238/82 *Duphar BV and others v The Netherlands State*, ECLI:EU:C:1984:45
- Case 170/84 *Bilka-Kaufhaus GmbH v Karin Weber von Hartz*, ECLI:EU:C:1986:204
- Case 150/85 *Jacqueline Drake v Chief Adjudication Officer,* ECLI:EU:C:1986:257
- Case C-177/88 *Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV Centrum) Plus*, ECLI:EU:C:1990:383
- Case C-279/93 *Finanzamt Köln-Altstadt v Roland Schumacker*, EU:C:1995:31
- Case C-237/94 *John O'Flynn v Adjudication Officer*, ECLI:EU:C:1996:206
- Case C-158/97 *Georg Badeck and Others,* ECLI:EU:C:2000:163
- Case C-167/97 *The Queen v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Per,* ECLI:EU:C:1999:60
- Case C-79/99, *Julia Schnorbus v Land Hessen*, ECLI:EU:C:2000:676.
- Case C-196/02 *Vasiliki Nikoloudi v Organismos Tilepikoinonion Ellados AE*, ECLI:EU:C:2005:141
- Case C-144/04 *Werner Mangold v Rüdiger Helm*, ECLI:EU:C:2005:709 (Grand Chamber)
- Case C-213/04 *Ewald Burtscher v Josef Stauderer*, ECLI:EU:C:2005:731
- Case C-13/05 *Sonia Chacón Navas v Eurest Colectividades SA*, ECLI:EU:C:2006:456
- Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*, ECLI:EU:C:2007:772 (Grand Chamber)
- Case C-267/06 *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*, ECLI:EU:C:2008:179 (Grand Chamber)
- Case C-303/06 *S. Coleman v Attridge Law and Steve Law*, ECLI:EU:C:2008:61 (Opinion of AG Poiares Maduro)
- Case C-303/06 *S. Coleman v Attridge Law and Steve Law*, ECLI:EU:C:2008:415 (Grand Chamber)

- Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa*, ECLI:EU:C:2009:519 (Grand Chamber)
- Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, ECLI:EU:C:2008:397
- Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes and Others v Saarland, Ministerium für Justiz, Gesundheit und Soziales NV*, ECLI:EU:C:2009:316 (Grand Chamber)
- Case C-388/07 *The Queen, on the application of The Incorporated Trustees of the National Council for Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform*, ECLI:EU:C:2009:128
- Case C-555/07 *Seda Kücükdeveci v Swedex GmbH & Co. KG*., ECLI:EU:C:2010:21 (Grand Chamber)
- Case C-88/08 *David Hütter v Technische Universität Graz*, ECLI:EU:C:2009:381
- Case C-147/08 *Jürgen Römer v Freie und Hansestadt Hamburg,* ECLI:EU:C:2011:286 (Grand Chamber)
- Case C-341/08 *Domnica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe,* ECLI:EU:C:2010:4 (Grand Chamber)
- Case C-499/08 *Ingeniørforeningen i Danmark, acting on behalf of Ole Andersen, v Region Syddanmark,* ECLI:EU:C:2010:600 (Grand Chamber)
- Case C-45/09 *Gisela Rosenbladt v Oellerking Gebäudereinigungsges. mbH.*, ECLI:EU:C:2010:601 (Grand Chamber)
- Case C-356/09 *Pensionsversicherungsanstalt v Christine Kleist,* ECLI:EU:C:2010:532 (Opinion of AG Kokott)
- Case C-356/09 *Pensionsversicherungsanstalt v Christine Kleist,* ECLI:EU:C:2010:703 (judgment)
- Case C-391/09 *Malgožata Runevič-Vardyn, Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija, Lietuvos Respublikos teisingumo ministerija, Valstybinė lietuvių kalbos komisija, Vilniaus miesto savivaldybės administracijos Teisės departamento Civilinės metrikacijos skyrius*, ECLI:EU:C:2011:291
- Case C-447/09 *Reinhard Prigge, Michael Fromm, Volker Lambach v Deutsche Lufthansa AG,* ECLI:EU:C:2011:573.
- Joined Cases C-297/10 and C-298/10 *Sabine Hennigs (C-297/10) v Eisenbahn-Bundesamt and Land Berlin (C-298/10) v Alexander Mai*, ECLI:EU:C:2011:560
- Case C-310/10 *Ministerul Justiției și Libertăților Cetățenești v Ştefan Agafiței and Others*, ECLI:EU:C:2011:467
- Case C-415/10 *Galina Meister v Speech Design Carrier Systems GmbH,* ECLI:EU:C:2012:217
- Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, ECLI:EU:C:2013:105 (Grand Chamber)
- Joined Cases C-124/11, C-125/11 and C-143/11 *Bundesrepublik Deutschland v Karen Dittrich and Robert Klinke and Jörg-Detlef Müller v Bundesrepublik Deutschland*, ECLI:EU:C:2012:771
- Case C-132/11 *Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH v Betriebsrat Bord der Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH,* ECLI:EU:C:2012:329
- Case C-152/11 *Johann Odar v Baxter Deutschland GmbH,* ECLI:EU:C:2012:772
- Joined Cases C-335/11 and C-337/11 *HK Danmark, acting on behalf of Jette Ring, v Dansk almennyttigt Boligselskab (C-335/11), and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S (C-337/11),* ECLI:EU:C:2013:222
- Case C-476/11 *HK Danmark acting on behalf of Glennie Kristensen v Experian A/S*, ECLI:EU:C:2013:590
- Case C-546/11 *Dansk Jurist- og Økonomforbund, acting on behalf of Erik Toftgaard v Indenrigs- og Sundhedsministeriet*, ECLI identifier: ECLI:EU:C:2013:603
- Case C-81/12 *Asociația Accept v Consiliul Național pentru Combaterea Discriminării,* ECLI:EU:C:2013:275
- Case C-267/12 *Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, ECLI:EU:C:2013:823
- Case C-363/12 *Z. v A Government department, The Board of management of a community school,* ECLI:EU:C:2014:159 (Grand Chamber)
- Case C-514/12 *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs GmbH v Land Salzburg*, ECLI:EU:C:2013:799
- Case C-354/13 *Fag og Arbejde (FOA), acting on behalf of Karsten Kaltoft, v Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund,* ECLI:EU:C:2014:2463

- Case C-523/13 *Walter Larcher v Deutsche Rentenversicherung Bayern Süd,* ECLI:EU:C:2014:2458
- Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia (third parties: Anelia Nikolova, Darzhavna Komisia za energiyno i vodno regulirane)*, ECLI:EU:C:2015:480 (Grand Chamber)
- Case C-441/14 *Dansk Industri (DI), acting on behalf of Ajos A/S, v Estate of Karsten Eigil Rasmussen,* ECLI:EU:C:2016:278
- Case C-122/15 *C.*, ECLI:EU:C:2016:391
- Case C-283/15 *X v Staatssecretaris van Financiën,* ECLI:EU:C:2017:102
- Case C-406/15 *Petya Milkova v Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen kontrol,* ECLI:EU:C:2017:198
- Case C-443/15 *David L. Parris v Trinity College Dublin, Higher Education Authority, Department of Public Expenditure and Reform, Department of Education and Skills,* ECLI:EU:C:2016:493 (Opinion of AG Kokott)
- Case C-443/15 *David L. Parris v Trinity College Dublin, Higher Education Authority, Department of Public Expenditure and Reform, Department of Education and Skills,* ECLI:EU:C:2016:897
- Case C-539/15 *Daniel Bowman v Pensionsversicherungsanstalt*, ECLI:EU:C:2016:977
- Case C-668/15 *Jyske Finans A/S v Ligebehandlingsnævnet, acting on behalf of Ismar Huskic,* ECLI:EU:C:2017:278
- Case C-270/16 *Carlos Enrique Ruiz Conejero v Ferroser Servicios Auxiliares SA, Ministerio Fiscal,* ECLI:EU:C:2018:17
- Case C-354/16 *Ute Kleinsteuber v Mars GmbH,* ECLI:EU:C:2017:539
- Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV*, ECLI:EU:C:2018:257 (Grand Chamber),
- Case C-451/16 *MB v Secretary of State for Work and Pensions*, ECLI:EU:C:2018:492
- Case C-482/16 *Georg Stollwitzer v ÖBB Personenverkehr AG,* ECLI:EU:C:2018:180
- Joined Cases C-569/16 and C-570/16 *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn*, ECLI:EU:C:2018:871 (Grand Chamber)
- Case C-193/17 *Cresco Investigation GmbH v Markus Achatzi,* ECLI:EU:C:2019:43 (Grand Chamber)
- Case C-312/17 *Surjit Singh Bedi v Bundesrepublik Deutschland, Bundesrepublik Deutschland in Prozessstandschaft für das Vereinigte Königreich von Großbritannien und Nordirland,* ECLI:EU:C:2018:734
- Case C-396/17 *Martin Leitner v Landespolizeidirektion Tirol,* ECLI:EU:C:2019:375
- Case C-457/17 *Heiko Jonny Maniero v Studienstiftung des deutschen Volkes eV*, ECLI:EU:C:2018:912
- Case C-573/17 *Daniel Adam Popławski*, ECLI:EU:C:2019:530 (Grand Chamber)
- Case C-55/18 *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE,* ECLI:EU:C:2019:402 (Grand Chamber)
- Case C-154/18 *Tomás Horgan, Claire Keegan v Minister for Education & Skills, Minister for Finance, Minister for Public Expenditure & Reform, Ireland, Attorney General,* ECLI:EU:C:2019:113
- Case C-161/18 *Violeta Villar Láiz v Instituto Nacional de la Seguridad Social (INSS), Tesorería General de la Seguridad Social (TGSS),* ECLI:EU:C:2019:382
- Case C-397/18 *DW v Nobel Plastiques Ibérica SA,* ECLI:EU:C:2019:703
- Case C-650/18 *Hungary v European Parliament*, ECLI:EU:C:2021:426 (Grand Chamber)
- Joined Cases C-804/18 and C-341/19 *IX v WABE eV and MH Müller Handels GmbH v MJ*, ECLI:EU:C:2021:594 (Grand Chamber)
- Case C-670/18 *CO v Comune di Gesturi*, ECLI:EU:C:2020:272
- Case C-16/19 *VL v Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, ECLI:EU:C:2021:64 (Grand Chamber)
- Case C-206/19 *'KOB' SIA v Madonas novada pašvaldības Administratīvo aktu strīdu komisija,* ECLI:EU:C:2020:463
- Case C-223/19 *YS v NK AG*, ECLI:EU:C:2020:753.
- Case C-243/19 *A v Veselības ministrija,* ECLI:EU:C:2020:872
- Case C-336/19 *Centraal Israëlitisch Consistorie van België and Others v Vlaamse Regering,* ECLI:EU:C:2020:1031

- Case C-511/19 *AB v Olympiako Athlitiko Kentro Athinon – Spyros Louis,* ECLI:EU:C:2021:274
- Case C-644/19, *FT v Universitatea 'Lucian Blaga' Sibiu, GS and Others, HS, Ministerul Educației Naționale*, ECLI:EU:C:2020:810
- Case C-94/20 *Land Oberösterreich v KV,* ECLI:EU:C:2021:477
- Case C-405/20 *EB, JS, DP gegen Versicherungsanstalt öffentlich Bediensteter, Eisenbahnen und Bergbau (BVAEB)*, ECLI:EU:C:2022:347
- Case C-485/20 *XXXX v HR Rail SA,* ECLI:EU:C:2022:85
- Case C-534/20 *Leistritz AG v LH*, ECLI:EU:C:2022:495
- Case C-344/20 *L.F. v SCRL* (pending)

LITERATURE

- Ambrus M., Busstra, M., Henrard, K. (2010) 'The Racial Equality Directive and effective protection against discrimination: mismatches between the substantive law and its application', *Erasmus Law Review* 3, pp. 165-180
- Atrey. S. (2018) 'Illuminating the CJEU's Blind Spot of Intersectional Discrimination in Parris v Trinity College Dublin', *Industrial Law Journal*, pp. 278-296
- Bantekas, I., Stein M. A., Anastasiou, D. (2018) *The UN Convention on the Rights of Persons with Disabilities: A Commentary*, Oxford: Oxford University Press
- Bell, M. (2007) 'EU anti-racism policy: the leader of the pack?', in: Meenan, H. (ed) *Equality Law in an Enlarged European Union. Understanding the Article 13 Directives*, Cambridge: Cambridge University Press, pp. 178-201
- Bell, M. (2007) 'Direct discrimination', in: Schiek, D., Waddington, L., Bell, M. (eds) *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Oxford: Hart Publishing, pp. 185-322
- Benedi Lahuerta, S. (2016) 'Ethnic discrimination, discrimination by association and the Roma community: *CHEZ*', *Common Market Law Review* 53 pp. 797-818
- Byrnes, A. (2012) 'Article 1', in: Freeman, M. A., Chinkin, C., Rudolf, B. (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women. A Commentary*, Oxford: Oxford University Press, pp. 51-70
- Cahn, C. (2016) 'Court of Justice of the EU Rules Collective and Inaccessible Electrical Metres Discriminate against Roma: CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia (C-83/14)', *European Journal of Migration and Law* 18, pp. 112-125
- Cera, R. (2017) 'Article 2 [Definitions]', in: Della Fina, V., Cera, R., Palmisano, G. (eds), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary*, Cham: Springer, pp. 107-118
- Chopin, I., Germaine, C., Tanczos, J. (2017) *Roma and the Enforcement of anti-discrimination law,* Luxembourg: Publications Office of the European Union
- Chopin, I., Germaine, C. (2022) *A comparative analysis of non-discrimination law in Europe 2021. The 27 EU Member States, Albania, Iceland, Liechtenstein, Montenegro, North Macedonia, Norway, Serbia, Turkey and the United Kingdom compared*, European network of legal experts in gender equality and non-discrimination, Luxembourg: Publications Office of the European Union
- Collins, H., Khaitan, T. (eds) (2018) *Foundations of Indirect Discrimination Law*, Oxford: Hart Publishing
- Collins, H., Khaitan, T. (eds) (2018) 'Indirect Discrimination Law: Controversies and Critical Questions', in: Collins, H., Khaitan, T. (eds) (2018) *Foundations of Indirect Discrimination Law*, Oxford: Hart Publishing, pp. 1-30
- Collins, H. (2018) 'Justice for Foxes: Fundamental Rights and Justification for Indirect Discrimination', in: Collins, H., Khaitan, T. (eds) (2018) *Foundations of Indirect Discrimination Law*, Oxford: Hart Publishing, pp. 249-278
- Dewhurst, E. (2020) *Age discrimination law outside the employment field,* European network of legal experts in gender equality and non-discrimination Luxembourg: Publications Office of the European Union

- De Schutter, O. (2005) *The Prohibition of Discrimination under European Human Rights Law. Relevance for EU Racial and Employment Equality Directives*, Luxembourg: Office for Official Publications of the European Communities
- De Vos, M. (2020) 'The European Court of Justice and the march towards substantive equality in European Union anti-discrimination law', *International Journal of Discrimination and the Law*, Vol. 20, pp. 62-87
- Dunne, P. (2020) *Sexual orientation discrimination law outside the labour market*, European network of legal experts in gender equality and non-discrimination Luxembourg: Publications Office of the European Union
- Ellis, E., Watson, P. (2012) *EU Anti-Discrimination Law*, (2nd edition), Oxford: Oxford University Press
- European Commission (2007) *Tackling Multiple Discrimination. Practices, policies and laws*, Luxembourg: Office for Official Publications of the European Communities
- European Court of Human Rights (2021) *Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention. Prohibition of discrimination*, updated on 31 August 2021, Strasbourg: Council of Europe
- European Roma Rights Centre (ERRC), Interights, Migration Policy Group (MPG) (2004) *Strategic Litigation of Race Discrimination in Europe: From Principles to Practice*
- Farkas, L., O'Farrell, O. (2015) *Reversing the burden of proof: Practical dilemmas at the European and national level,* European network of legal experts in the non-discrimination field, Luxembourg: Publications Office of the European Union
- FRA (European Union Agency for Fundamental Rights), Council of Europe (2018) *Handbook on European non-discrimination law*, Luxembourg: Publications Office of the European Union
- Frantziou, E. (2021) 'Joined cases C-804/18 and C-341/19, *IX* v *WABE eV* and *MH Muller Handels GmbH* v *MJ*: religious neutrality in a private workplace? Employer friendly and far from neutral', *European Law Review* No. 5, pp. 674-684
- Fredman, S. (2003) 'The Age of Equality', in: Fredman, S., Spencer, S. (eds) *Age as an Equality Issue*, Oxford: Hart Publishing, pp. 21-69
- Fredman, S. (2011), *Discrimination Law*, (2nd edition), Oxford: Oxford University Press
- Fredman, S. (2016), 'The Reason Why: unravelling indirect discrimination', *Industrial Law Journal* 45/2, pp. 231-243
- Fredman, S. (2016), *Intersectional Discrimination in EU gender equality and non-discrimination law*, European network of legal experts in gender equality and non-discrimination, Luxembourg: Publications Office of the European Union
- Fredman, S. (2018) 'Direct and Indirect Discrimination: Is There Still a Divide?', in: Collins, H., Khaitan, T. (eds), *Foundations of Indirect Discrimination Law*, Oxford: Hart Publishing, pp. 31-55
- Gerards, J. (2005) *Judicial Review in Equal Treatment Cases*, Leiden/Boston: Martinus Nijhoff
- Gerards, J. (2020) 'Non-Discrimination, the European Court of Justice and the European Court of Human Rights: Who takes the Lead?', in: Giegerich, T. (ed) and Backes, C., Jungfleisch, J. (asst. eds), *The European Union as Protector and Promoter of Equality*, Cham: Springer, pp. 135-163
- Gerards, J., Xenidis, R. (2020) *Algorithmic discrimination in Europe. Challenges and opportunities for gender equality and non-discrimination law. A special report*, European network of legal experts in gender equality and non-discrimination Luxembourg: Publications Office of the European Union
- Gijzen, M. (2006) *Selected Issues in Equal Treatment Law: A multi-layered comparison of European, English and Dutch law*, Antwerp/Oxford: Intersentia
- Goodwin, M. (2006) '*D.H. and Others* v. *Czech Republic*: a major set-back for the development of non-discrimination norms in Europe', *German Law Journal*, pp. 421-432
- Harris, D.J., O'Boyle, M., Bates, E., Buckley, C. (2018) *Harris, O'Boyle & Warbrick: law of the European Convention on Human Rights*, (4th edition), Oxford: Oxford University Press
- Havelková, B. (2018) 'Judicial Scepticism of Discrimination at the ECtHR', in: Collins, H., Khaitan, T. (eds), *Foundations of Indirect Discrimination Law*, Oxford: Hart Publishing, pp. 83-103
- Haverkort-Speekenbrink, S. (2012) *European Non-Discrimination Law. A comparison of EU Law and the ECHR in the Field of Non-Discrimination and Freedom of Religion in Public Employment with an Emphasis on the Islamic Headscarf Issue,* Cambridge/Antwerp/Portland: Intersentia

- Heirwegh, T., Van de Graaf, C. (2019) 'The local swimming pool as a space of rights contestation – an analysis of 'burkini' policies in Belgian local public swimming pools', *The Journal of Legal Pluralism and Unofficial Law* 51:2
- Henrard, K. (2019) 'The Effective Protection against Discrimination and the Burden of Proof. Evaluating the CJEU's Guidance Through the Lens of Race', in: Belavusau, U., Henrard, K. (eds) (2019) *EU Anti-Discrimination Law Beyond Gender*, Oxford: Hart Publishing, pp. 95-117
- Hervey, T., Tobler, C. (2020) 'Non-ideal Weight Discrimination in EU Law', in: Giegerich, T. (ed) and Backes, C., Jungfleisch, J. (asst. eds), *The European Union as Protector and Promoter of Equality*, Cham: Springer
- Holtmaat, R. (2012) 'Article 5', in: Freeman, M. A., Chinkin, C., Rudolf, B. (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women. A Commentary*, Oxford: Oxford University Press, pp. 141-167
- Horton, R. (2019) 'Justifying Age Discrimination in the EU', in: Belavusau, U., Henrard, K. (eds) (2019) *EU Anti-Discrimination Law Beyond Gender*, Oxford: Hart Publishing, pp. 273-293
- Howard, E. (2019) *Religious clothing and symbols in employment. A legal analysis of the situation in the EU Member States*, European network of legal experts in gender equality and non-discrimination, Luxembourg: Office for Official Publications of the European Union
- Howard, E. (2022) 'Headscarves and the CJEU: Protecting fundamental rights and pandering to prejudice, the CJEU does both', *Maastricht Journal of European and Comparative Law* 29, pp. 245-262
- Iordache, R., Ionescu, I. (2022) *Effectively enforcing the right to non-discrimination. Promising practices implementing and going beyond the requirements of the Racial Equality and Employment Equality Directives*, European network of legal experts in gender equality and non-discrimination, Luxembourg: Publications Office of the European Union
- Jončas, D. (2021), 'Supreme Court of Lithuania rules on indirect discrimination at work', blog post, 6 October 2021.
- Kleber, E. (2019) 'Article 1 CEDEF', in: Hertig Randall, H., Hottelier, M., Lempen, K. (eds) *CEDEF – La Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes et son Protocole facultatif*, Geneva: Schulthess éditions romandes, pp. 23-46
- Kleber, E. (2015) *La discrimination multiple: étude de droit international, suisse et européen*, Geneva: Schulthess éditions romandes
- La Barbera, M.C., Cruells López, M. (2019) 'Toward the Implementation of Intersectionality in the European Multilevel Legal Praxis: *B.S.* v. *Spain*', *Law & Society Review* 53 pp. 1167-1201
- Lippert-Rasmussen, K. (2018) 'Indirect Discrimination, Affirmative Action and Relational Egalitarianism', in: Collins, H., Khaitan, T. (eds), *Foundations of Indirect Discrimination Law*, Oxford: Hart Publishing, pp. 173-196
- Loenen, T. (1999) 'Indirect Discrimination: Oscillating Between Containment and Revolution', in: Loenen, T., Rodrigues, P.R. (eds), *Non-Discrimination Law: Comparative Perspectives,* The Hague: Kluwer Law International, pp. 195-211
- Makkonen, T. (2007), *Measuring Discrimination. Data Collection and EU Equality Law,* Luxembourg: Office for Official Publications of the European Communities
- Martin, D. (2018) 'Cachez ce voile que je ne saurais voir!', *Droit social*, pp. 314-322
- McCrudden, C. (2016) 'The New Architecture of EU Equality Law after CHEZ: Did the Court of Justice reconceptualise direct and indirect discrimination?', *European Equality Law Review*, 2016/1, pp. 1-10
- Mercat-Bruns, M. (2017) 'Multiple discrimination and intersectionality: issues of equality and liberty: Multiple discrimination and intersectionality', *International Social Science Journal* 67, pp. 43-54
- Moreau, S. (2018) 'Moral Seriousness of Indirect Discrimination', in: Collins, H., Khaitan, T. (eds), *Foundations of Indirect Discrimination Law*, Oxford: Hart Publishing, pp. 123-148
- Muir, E. (2018) *EU Equality Law. The First Fundamental Rights Policy of the EU,* Oxford: Oxford University Press
- Muir, E. (2019) 'The Essence of the Fundamental Right to Equal Treatment: Back to the Origins', *German Law Journal* 20, pp. 817-839
- Mulder, J. (2021) *Indirect sex discrimination in employment. Theoretical analysis and reflections on the CJEU case law and national application of the concept of indirect sex discrimination*, European

network of legal experts in gender equality and non-discrimination, Luxembourg: Publications Office of the European Union
- Mulder, J. (2022) 'Religious neutrality policies at the workplace: Tangling the concept or direct and indirect religious discrimination. *WABE and Müller*', *Common Market Law Review* 59 pp. 1501-1522
- Neier, C. (2021) 'Das Verbot mittelbarer Diskriminierung als gemeineuropäisches Rechtsprinzip. Tour d'horizon zum EU- und EWR-Recht, zur EMRK sowie zum deutschen, schweizerischen und liechtensteinischen Recht', in: Hoch, H., Neier, C., Schiess, P. (eds), *100 Jahre Liechtensteinische Verfassung,* Liechtenstein Politische Schriften, Vol. 62, pp. 243-270
- O'Cinneide, C. (2020) 'Uniformity or Variation: Should the CJEU 'Carry Over' its Gender Equality Approach to the Post-2000 Equality Grounds?', in: Giegerich, T. (ed) and Backes, C., Jungfleisch, J. (asst. eds), *The European Union as Protector and Promoter of Equality*, Cham: Springer, pp. 115-133
- Rainey, B., Wicks, E., Ovey, C. (2021) *Jacobs, White, and Ovey: The European Convention on Human Rights*, (8th edition), Oxford: Oxford University Press
- Relaño Pastor, E. (2019) 'Religious Discrimination in the Workplace. *Achbita* and *Bougnaoui*', in: Belavusau, U., Henrard, K. (eds) (2019) *EU Anti-Discrimination Law Beyond Gender*, Oxford: Hart Publishing, pp. 143-202
- Quinn, G. (2007) 'Disability discrimination in the European Union', in: Meenan, H. (ed), *Equality Law in an Enlarged European Union. Understanding the Article 13 Directives*, Cambridge: Cambridge University Press, pp. 231-277
- Röbke, M. (2010) 'Höchstaltersgrenzen für Einstellung in feuerwerhrtechnischen Dienst' (Maximum age limits for employment in the fire service), *Europäische Zeitschrift für Wirtschaftsrecht*, pp. 142-146
- Schiek, D. (2007) 'Indirect Discrimination', in: Schiek, D., Waddington, L., Bell, M. (eds) *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Oxford: Hart Publishing, pp. 323-475
- Schiek, D. (2018) 'On uses, mis-uses and non-uses of intersectionality before the Court of Justice (EU)', *International Journal of Discrimination and the Law* 18, pp. 82-103
- Śledzińska-Simon, A. (2019), 'Unveiling the Culture of Justification in the European Union. Religious Clothing and the Proportionality Review', in: Belavusau, U., Henrard, K. (eds) (2019) *EU Anti-Discrimination Law Beyond Gender*, Oxford: Hart Publishing, pp. 340-361
- Stephanos, S. (2022) 'The human rights aspect of Grenoble's "burkini" controversy', *EUobserver*, 4 July 2022
- Suk, J.C. (2018) 'Anti-discrimination Law and the Duty to Integrate', in: Collins, H., Khaitan, T. (eds), *Foundations of Indirect Discrimination Law*, Oxford: Hart Publishing, pp. 223-247
- Thomsen, F.K. (2015) 'Stealing Bread and Sleeping Beneath Bridges – Indirect Discrimination as Disadvantageous Equal Treatment', *Moral Philosophy and Politics*, 2(2), pp. 299-327
- Thornberry, P. (2016) *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary*, Oxford: Oxford University Press
- Tobler, C. (2005) *Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*, Antwerp/Oxford: Intersentia
- Tobler, C. (2005) *Remedies and Sanctions in EC non-discrimination law. Effective, proportionate and dissuasive national sanctions and remedies, with particular reference to upper limits on compensation to victims of discrimination,* European network of legal experts in the non-discrimination field, Luxembourg: Publications Office of the European Communities
- Tobler, C. (2008) *Limits and potential of the concept of indirect discrimination*, European network of legal experts in the non-discrimination field, Luxembourg: Office for Official Publications of the European Communities
- Tobler, C. (2013) 'The prohibition of discrimination in the Union's layered system of equality law: from early staff cases to the *Mangold* approach', in: Rosas, A., Levits, E., Bot, Y. (eds), *La cour de justice et la construction de l'Europe: Analyses et perspectives de 60 ans de jurisprudence/The Court of Justice and the construction of Europe: Analyses and perspectives on 60 years of case-law*, The Hague: Asser Press/Springer, pp. 443-467

- Tobler, C. (2020) 'Article 10. Charge de la preuve / Burden of proof' in: Dubout, E. (ed) *Directive 2000/78 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail. Commentaire article par article*, Brussels: Bruylant, pp. 257-276
- Tobler, C., Beglinger, J. (2020) Essential EU Law in Charts (5th edition, post-Brexit), Budapest: HVG-ORAC
- Tobler, C. (2022) 'General principles of equal treatment in EU non-discrimination law', in: Ziegler, K.S., Neuvonen, P.J., Moreno-Lax, V. (eds), *Research Handbook on General Principles in EU Law. Constructing Legal Orders in Europe,* Cheltenham/Northampton: Edward Elgar, pp. 351-366
- Tryfonidou, A. (2017) 'Another failed opportunity for the effective protection of the rights of same-sex couples under Eu law: *Parris* v *Trinity College Dublin and Others*', *Anti-Discrimination Law Review* No. 2, pp. 83-95
- Tryfonidou, A. (2019) 'The Impact of the Framework Equality Directive on the Protection of LGB Persons and Same-Sex Couples from Discrimination under EU Law', in: Belavusau, U., Henrard, K. (eds) (2019) *EU Anti-Discrimination Law Beyond Gender*, Oxford: Hart Publishing, pp. 229-248
- Valenti, V. (2015) 'Principle of non-discrimination on the grounds of sexual orientation and same-sex marriage: a comparison between United States and European case law', in: Pineschi, L. (ed) *General Principles of Law – The Role of the Judiciary*, Cham: Springer, pp. 215-241
- Valentine, S. (2019) 'Die einschränkende Auslegung des Diskriminierungsverbots wegen der "ethnischen Herkunft" durch den EuGH', *Neue Zeitschrift für Arbeitsrecht* 2019/6, pp. 364-367
- Van den Brink, M., Dunne, P. (2018) *Trans and intersex equality rights in Europe – a comparative analysis*, European network of legal experts in gender equality and non-discrimination, Luxembourg: Office for Official Publications of the European Union
- Vickers, L. (2006) *Religion and Belief Discrimination in Employment – the EU Law*, European network of legal experts in the non-discrimination field, Luxembourg: Office for Official Publications of the European Communities
- Waddington, L. (2008) 'Annotation of *Palacios de la Villa*', *Common Market Law Review* 45 pp. 895-905
- Waddington, L. (2019) 'The Influence of the CRPD on EU Anti-Discrimination Law', in: Belavusau, U., Henrard, K. (eds) (2019) *EU Anti-Discrimination Law Beyond Gender*, Oxford: Hart Publishing, pp. 340-361
- Weichsicelbaumer, D. (2020), 'Multiple discrimination against female immigrants wearing headscarves', *Industrial and Labour Relations Review* 73, pp. 600-627
- Whittle, R. (2002) 'The Framework Directive for equal treatment in employment and occupation: an analysis from a disability rights perspective', *European Law Review*, pp. 303-326
- Xenidis, R. (2019) 'Multiple Discrimination in EU Anti-Discrimination Law. Towards Redressing Complex Inequality?', in: Belavusau, U., Henrard, K. (eds) (2019) *EU Anti-Discrimination Law Beyond Gender*, Oxford: Hart Publishing, pp. 41-74
- Xenidis, R. (2020) 'Article 8. Prescriptions minimales / minimum requirements', in: Dubout, E. (ed) *Directive 2000/78 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail. Commentaire article par article*, Brussels: Bruylant, pp. 209-241
- Yoshida, K. (2013) 'Towards Intersectionality in the European Court of Human Rights: The Case of B.S. v Spain', *Feminist Legal Studies* 21 pp. 195-204
- Yu, A. (2019) 'Direct and indirect discrimination: a distinction with a difference', *Western Journal of Legal Studies* 9 (2019) 2, pp. 1-21
- Zaccaroni, G. (2021) *Equality and Non-discrimination in the EU. The Foundations of the EU Legal Order,* Cheltenham/Northampton: Edward Elgar
- Zuiderveen Borgesius, F. (2018) *Discrimination, Artificial Intelligence and Algorithmic Decision-Making*, Strasbourg: Council of Europe

Annex I: Comparative table 'Definition of indirect discrimination'

COUNTRY	Yes	No	Legislation covering the five discrimination grounds (Directives 43 and 78)	Definition
AUSTRIA	X		Equal Treatment Act of 23 June 2004, Art. §§ 17(1), 18, 19, 31(1)	'Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of an ethnic origin or persons with a particular religion or belief, a particular age or a particular sexual orientation at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.'
	X		Federal-Equal Treatment Act of 23 June 2004, Art. § 13a/2	'Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of an ethnic origin or persons with a particular religion or belief, a particular age or a particular sexual orientation at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.'
	X		Act on the Employment of People with Disabilities of 11 August 2005, Art. § 7c/2	'Indirect discrimination shall be taken to occur where apparently neutral provisions, criterions or practices or characteristics of constructed areas would put people with disabilities at a particular disadvantage compared with other persons, unless that provisions, criterions or practices or characteristics of constructed areas is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.'
	X		Federal Disability Equality Act of 23 June 2004, Art. § 4/2	'Indirect discrimination shall be taken to occur where apparently neutral provisions, criterions or practices or characteristics of constructed areas would put people with disabilities at a particular disadvantage compared with other persons, unless that provisions, criterions or practices or characteristics of constructed areas is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.'
	X		Province legislation[1]	'Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of an ethnic origin or persons with a particular religion or belief, a particular age or a particular sexual orientation at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.'
BELGIUM	X		Act criminalising certain acts inspired by racism or xenophobia (Racial Equality Federal Act) of 31 July 1981, Arts. 4 (8), 4 (9) and 9	Article 4(9) defines 'indirect discrimination' as an 'indirect distinction' on the basis of one of the protected grounds, which cannot be justified under Article 9. Article 4(8) defines 'indirect distinction' as the situation that occurs whenever an apparently neutral provision, criterion or practice, may result in ('est susceptible d'entraîner'), comparing to other persons, a particular disadvantage for persons characterised by one of those protected grounds. Article 9 provides that such apparently neutral measures may only be justified if they are objectively justified by a legitimate objective that they seek to fulfil by means which are both appropriate and necessary.

1 In all 9 provinces, indirect discrimination on all grounds in the Directives and the whole scope of Directive 200/43 is covered by different provincial pieces of legislation. They all use the same definition (quoted from the Directive).

COUNTRY	Yes	No	Legislation covering the five discrimination grounds (Directives 43 and 78)	Definition
BELGIUM	X		Act pertaining to fight against certain forms of discrimination (General Anti-discrimination Federal Act) of 10 May 2007, Arts. 4(8), 4(9) and 9	Article 4(9) defines 'indirect discrimination' as an 'indirect distinction' on the basis of one of the protected grounds, which cannot be justified under Article 9. Article 4(8) defines 'indirect distinction' as the situation that occurs whenever an apparently neutral provision, criterion or practice, may result in, comparing to other persons, a particular disadvantage for persons characterised by one of those protected grounds. Article 9 provides that such apparently neutral measures may only be justified if they are objectively justified by a legitimate objective that they seek to fulfil by means which are both appropriate and necessary, or, in the case of indirect discrimination based on disability, if it is proved that no reasonable accommodation can be put in place.
	x		Flemish Region Decree on proportionate participation in the employment market of 8 May 2002, Art. 2(9)	'An indirect discrimination happens when an apparently neutral provision, criterion or practice, may result in, comparing to other persons, a particular disadvantage for persons characterised by one of those protected grounds, unless it is proved that they are objectively justified by a legitimate objective that they seek to fulfil by means which are both appropriate and necessary'.
	X		Decree of the Walloon Region on the Fight Against Certain Forms of Discrimination of 6 November 2008, Art. 4(8), 4(9) and 9	Article 4(9)) defines 'indirect discrimination' as an 'indirect distinction' on the basis of one of the protected grounds, which cannot be justified under Article 9. Article 4(8) defines 'indirect distinction' as the situation that occurs whenever an apparently neutral provision, criterion or practice, may result in, comparing to other persons, a particular disadvantage for persons (personally or by association) characterised by one of those protected grounds. Article 9 provides that such apparently neutral measures may only be justified if they are objectively justified by a legitimate objective that they seek to fulfil by means which are both appropriate and necessary, or, in the case of indirect discrimination based on disability, if it is proved that no reasonable accommodation can be put in place.
	X		Ordinance of the Region of Brussels-Capital related to the Fight Against Discrimination and Equal Treatment in the Employment field of 4 September 2008, Art. 4(3), 4(8) and 9	Art. 4, 3° defines indirect discrimination as an apparently neutral provision, criterion or practice, which may result in, comparing to other persons, a particular disadvantage for persons characterised by one of those protected grounds. Article 8 specifies that 'The provision, practice or criterion referred to in Article 4, 3° shall not constitute indirect discrimination if it is objectively and reasonably justified by a legitimate aim, and insofar as the means of achieving that aim are appropriate and necessary', while Article 9 provides that 'A distinction on the basis of disability shall not constitute indirect discrimination where it is proved that reasonable accommodation cannot be put in place.'
			Framework Ordinance of the Region of Brussels-Capital: to ensure a Diversity Policy and to combat discrimination in the local Brussels Civil Service of 25 April 2019, Art. 4(14), 4(15) and 14	Article 4(15) defines 'indirect discrimination' as an 'indirect distinction' on the basis of one of the protected grounds, which cannot be justified under Section II of the ordinance. Article 4(14) defines 'indirect distinction' as the situation that occurs whenever an apparently neutral provision, criterion or practice, may result in, comparing to other persons, a particular disadvantage for persons characterised by one of those protected grounds. Article 14 provides that such apparently neutral measures may only be justified if they are objectively justified by a legitimate objective that they seek to fulfil by means which are both appropriate and necessary, or, in the case of indirect discrimination based on disability, if it is proved that no reasonable accommodation can be put in place.

COUNTRY	Yes	No	Legislation covering the five discrimination grounds (Directives 43 and 78)	Definition
BELGIUM	X		Decree of the Commission communautaire française on the Fight Against certain forms of discrimination and on the implementation of the principle of equal treatment of 9 July 2010, Art. 5(3)	Art. 5, 3° defines indirect discrimination as an apparently neutral provision, criterion or practice, may result in, comparing to other persons, a particular disadvantage for persons characterised by one of those protected grounds. Article 12 specifies that the provision, practice or criterion referred to in Article 5, 3° shall not constitute indirect discrimination if it is objectively and reasonably justified by a legitimate aim, and insofar as the means of achieving that aim are appropriate and necessary, or, in the case of indirect discrimination based on disability, if it is proved that no reasonable accommodation can be put in place.
	X		Decree of the French Community on the fight against certain forms of discrimination of 12 December 2008, Art. 3(4) and 3(5)	Article 3 (4) defines 'indirect distinction' as the situation that occurs whenever an apparently neutral provision, criterion or practice, may result in, comparing to other persons, a particular disadvantage for persons characterised by one of those protected grounds. Article 3 (5) defines 'indirect discriminations' as an 'indirect distinctions' which could not be objectively justified by a legitimate objective that they seek to fulfil by means which are both appropriate and necessary.
	X		Decree of the German-speaking Community aimed at fighting certain forms of discrimination of 19 March 2012, Art. 3(4) and 3(5)	Article 3 (4) defines 'indirect distinction' as the situation that occurs whenever an apparently neutral provision, criterion or practice, may result in, comparing to other persons, a particular disadvantage for persons characterised by one of those protected grounds. Article 3 (5) defines 'indirect discriminations' as an 'indirect distinctions' which could not be objectively justified by a legitimate objective that they seek to fulfil by means which are both appropriate and necessary.
	X		Decree of the Flemish Community establishing a Framework for the Flemish equal opportunities and equal treatment policy of 10 July 2008, Art. 16 § 2	'An indirect discrimination occurs whenever an apparently neutral provision, criterion or practice, can adversely affect persons with an actual or presumed protected characteristic in their own right or by association, as compared to other persons, unless such provision, criterion or practice is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or unless, in the case of an indirect distinction on the basis of disability, it can be shown that no reasonable accommodation can be made.'
	X		Ordinance to promote diversity and combat discrimination in the Brussels regional civil service of 4 September 2008, Art. 4(7) and 11	Art. 4, 7° defines indirect discrimination as an apparently neutral provision, criterion or practice, may result in, comparing to other persons, a particular disadvantage for persons characterised by one of those protected grounds. Article 11 specifies that the provision, practice or criterion referred to in Article 4,7° shall not constitute indirect discrimination if it is objectively and reasonably justified by a legitimate aim, and insofar as the means of achieving that aim are appropriate and necessary, or, in the case of indirect discrimination based on disability, if it is proved that no reasonable accommodation can be put in place.
	X		Ordinance to fight against certain forms of discrimination and to promote equal treatment of 5 October 2007, Art. 5(5), 5(6) and 12	Article 5 (6) defines 'indirect discrimination' as an 'indirect distinction' on the basis of one of the protected grounds, which cannot be justified under Section II of the ordinance. Article 5 (5) defines 'indirect distinction' as the situation that occurs whenever an apparently neutral provision, criterion or practice, may result in, comparing to other persons, a particular disadvantage for persons characterised by one of those protected grounds. Article 12 provides that such apparently neutral measures may only be justified if they are objectively justified by a legitimate objective that they seek to fulfil by means which are both appropriate and necessary, or, in the case of indirect discrimination based on disability, if it is proved that no reasonable accommodation can be put in place.

COUNTRY	Yes	No	Legislation covering the five discrimination grounds (Directives 43 and 78)	Definition
BELGIUM	X		Decree of the Commission communautaire française on equal treatment between persons in vocational training of 22 March 2007, Art. 3 § 3	Art. 3, § 3, provides that an indirect discrimination occurs whenever an apparently neutral provision, criterion or practice, may result in, comparing to other persons, a particular disadvantage for persons characterised by one of those protected grounds, unless if they are objectively justified by a legitimate objective that they seek to fulfil by means which are both appropriate and necessary.
	X		Brussels Housing Code of 17 July 2003, Art. 193(4), 193(5) and 197	Article 193 (5) defines 'indirect discrimination' as an 'indirect distinction' on the basis of one of the protected grounds, which cannot be justified under Chapter III of Title X of the ordinance. Article 193 (4) defines 'indirect distinction' as the situation that occurs whenever an apparently neutral provision, criterion or practice, may result in, comparing to other persons, a particular disadvantage for persons characterised by one of those protected grounds. Article provides that such apparently neutral measures may only be justified if they are objectively justified by a legitimate objective that they seek to fulfil by means which are both appropriate and necessary, or, in the case of indirect discrimination based on disability, if it is proved that no reasonable accommodation can be put in place.
BULGARIA	X		Protection Against Discrimination Act (PADA) of 16 September 2003, Art. 4(3)	Placing a person or persons who have a [protected] characteristic or a person or persons without such a characteristic together with the former suffer less favourable treatment or are placed at a particular disadvantage deriving from an apparently neutral provision, criterion or practice, unless the provision, criterion or practice are objectively justified with a view to a legitimate aim and the means to achieving that aim are appropriate and necessary.
CROATIA	X		Anti-Discrimination Act of 9 July 2008, Art. 2(2)	Indirect discrimination is a situation where an apparently neutral provision, criterion or practice places or could place a person in a less favourable position on the prohibited ground, in relation to other persons in a comparable situation, unless such a provision, criterion or practice may be objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Indirect discrimination is justified if there is a legitimate aim and the means of achieving that aim are appropriate and necessary.
CYPRUS	X		Law on Equal Treatment in Employment and occupation 58(I)/2004 of 30 April 2004, Art. 2	Any apparently neutral provision, criterion or practice which is likely to result in a person being treated less favourably than other persons on one of the grounds covered by the law, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.
	X		Law on Equal Treatment (Racial or Ethnic origin) No. 59(I)2004 of 30 April 2004, Art. 2	Any apparently neutral provision, criterion or practice which would put a person of a particular racial or ethnic origin at a disadvantage compared with another person, unless the provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.
	X		Law on persons with disabilities No. 127(I)/2000 of 21 July 2000, Art. 2	A provision, criterion or practice which is apparently neutral and which is likely to result in a person with a disability being treated less favourably than other persons, unless (a)the provision, criterion or practice in question is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary; or (b)the employer or any person or body to whom this Act applies takes appropriate steps, in accordance with the principle set out in subsection (1A) of section 5, with a view to eliminating the disadvantages resulting from that provision, criterion or practice (article 5(1A) provides for reasonable accommodation).

COUNTRY	Yes	No	Legislation covering the five discrimination grounds (Directives 43 and 78)	Definition
CZECHIA	X		Anti-Discrimination Act of 23 April 2009, Section 3(1) and (2)	An act or omission, when on the basis of a seemingly neutral provision, criteria or practice, any person is disadvantaged compared to others on any of the discriminatory grounds. There is no indirect discrimination if that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving it are proportionate. Indirect discrimination on the grounds of disability also means refusing or failing to take reasonable accommodation ensuring that a person with a disability has access to a particular job, work, job counselling, other professional participation, education, or public services; unless such a measure would impose a disproportionate burden.
DENMARK	X		Act on the Prohibition of Discrimination in the Labour Market etc. of 24 May 1996, Section 1(3)	Indirect discrimination shall be deemed to occur where an apparently neutral provision, criterion or practice would put persons of a particular race, skin colour, religion or belief, political opinion, sexual orientation or national, social or ethnic origin, age or disability at a disadvantage compared to other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.
	X		Act on Ethnic Equal Treatment of 28 May 2003, Section 3(3)	Indirect discrimination shall be deemed to occur where an apparently neutral provision, criterion or practice would put persons of a particular racial or ethnic origin at a disadvantage compared to other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.
	X		Act on the Prohibition of Discrimination due to Disability of 8 June 2018, Section 5(3)	Indirect discrimination shall be deemed to occur where an apparently neutral provision, criterion or practice would put persons with a disability at a disadvantage compared to other persons.
	X		Act on Gender Equality of 28 December 2021, Section 2a (3)[2]	Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would place persons of one gender at a particular disadvantage compared with persons of the other gender, or if it would place persons at a particular disadvantage because of their sexual orientation, inter-gender (gender identity), gender expression, and gender characteristics compared with other persons. This does not apply if the provision, criterion or practice in question is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.
ESTONIA	X		Equal Treatment Act of 11 December 2008, Art. 3 (4)	Indirect discrimination is taken to occur where an apparently neutral provision, criterion or practice would put persons, on grounds of any characteristic specified in subsection 1 (1) of this Act, at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.
FINLAND	X		Non-Discrimination Act of 30 December 2014, Section 13	If an apparently neutral rule, criterion or practice puts a person at a disadvantage compared with others.

2 The act added the discrimination ground of sexual orientation.

COUNTRY	Yes	No	Legislation covering the five discrimination grounds (Directives 43 and 78)	Definition
FRANCE	X		Law No. 2008-496 of 27 May 2008 relating to the adaptation of National Law to Community Law in matters of discrimination, Art. 1	Indirect discrimination shall be deemed to occur where an apparently neutral provision, criterion or practice, which, on one of the grounds mentioned in paragraph 1, gives rise to a particular disadvantage for persons in comparison with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.
GERMANY	X		General Law on Equal Treatment of 14 August 2006, Section 3.2	Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons at a particular disadvantage compared with other persons on any of the grounds referred to under Section 1,[3] unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.
GREECE	X		Law 4443/2016 On the transposition of Directive 43/2000/EC on the application of the principle of equal treatment irrespective of race and ethnic origin, and the transposition of Directive 78/2000/EC on the configuration of the general framework of equal treatment in employment and work of 2 December 2016, Art. 2(2)(b)	'When a seemingly neutral provision, criterion or practice places a person with certain characteristics of race, colour, national or ethnic origin, descent, religious or other beliefs, disability or chronic illness, age, family or social status, sexual orientation and gender identity or characteristics, in a less favourable position in comparison with other people [without these characteristics].
HUNGARY	X		Act CXXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities of 28 December 2003, Art. 9	A provision not deemed as direct discrimination and ostensibly meeting the requirement of equal treatment is deemed as indirect discrimination if it puts individual persons or groups with characteristics specified in Article 8 in a situation that is significantly disproportionately disadvantageous compared to the situation in which a person or group in a comparable position is, has been or would be.
IRELAND	X		Employment Equality Acts 1998-2021 of 18 June 1996, Section 31	Indirect discrimination occurs where an apparently neutral provision would put persons who differ in a respect mentioned in any paragraph of section 28(1) at a particular disadvantage in respect of any matter other than remuneration compared with other employees of their employer. The employer shall be treated for the purposes of this Act as discriminating…unless the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.
	X		Equal Status Acts 2000-2018 of 26 April 2000, Section 3(1)(c)	Indirect discrimination occurs 'where an apparently neutral provision would put a person referred to in any paragraph of section 3(2) at a particular disadvantage compared with other persons, unless the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

3 The grounds listed in Section 1 are race or ethnic origin, religion or belief, disability, age and sexual orientation.

COUNTRY	Yes	No	Legislation covering the five discrimination grounds (Directives 43 and 78)	Definition
IRELAND	X		Pensions Acts 1990-2018 of 24 July 1990, Section 68	'For the purposes of this Part, indirect discrimination occurs where an apparently neutral rule of the scheme concerned would put persons (whether each of them is X or Y) who differ in a respect mentioned in section 66(2) at a particular disadvantage in respect of any of the discriminatory grounds compared with other persons, being members or prospective members of that scheme. (2) Where indirect discrimination occurs, the rule of the scheme concerned shall be treated as being in breach of the principle of equal pension treatment in relation to the persons referred to in subsection (1) on the discriminatory ground in respect of which the disadvantage is claimed unless the rule is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. (3) In any proceedings statistics are admissible for the purpose of determining whether indirect discrimination has occurred.'
ITALY	X		Legislative Decree No. 215/2003 implementing Directive 2000/43/EC on equality of treatment between persons irrespective of racial or ethnic origin of 9 July 2003, Art. 2(1)(B)	A situation 'where an apparently neutral provision, criterion, practice, act, pact or behaviour would put persons belonging to a certain race of ethnic origin at a particular disadvantage compared with other persons'.
	X		Legislative Decree No. 216 on the implementation of Directive 2000/78/ EC for equal treatment in employment and occupation of 9 July 2003, Art. 2(1)(b)	A situation 'where an apparently neutral provision, criterion, practice, act, pact or behaviour would put person at a particular disadvantage compared with other persons for their religion or belief, disability, age or sexual orientation'.
	X		Legislative Decree no. 67 on Provisions on the judicial protection of persons with disabilities who are victims of discrimination of 1 March 2006, Art. 2(3)	Indirect discrimination occurs when a provision, criterion, practice, act, covenant or behaviour apparently neutral puts a person with a disability in a position of disadvantage compared to other persons.
LATVIA	X		Labour Law of 20 February 2001, Art. 29(6), 29(9)	'Indirect discrimination exists if an apparently neutral provision, criterion or practice causes adverse consequences for persons belonging to one gender, except in cases where such provision, criterion or practice is objectively justified by a legitimate aim, the means for attaining which are proportionate'
LITHUANIA	X		Law on Equal Treatment of 18 November 2003, Art. 2(5)	Indirect discrimination means any act or omission, legal provision or assessment criterion, apparently neutral provision or practice that formally are the same but their implementation or application results or would result in de facto restrictions on the exercise of rights or extensions of privileges, preferences or advantages on the grounds of gender, race, nationality, citizenship, language, origin, social status, belief, convictions or views, age, sexual orientation, disability, ethnic origin or religion, unless that act or omission, legal provision or assessment criterion, provision or practice is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

COUNTRY	Yes	No	Legislation covering the five discrimination grounds (Directives 43 and 78)	Definition
LUXEMBOURG	X		Law of 28 November 2006, 1. Transposing Council Directive 2000/43/ EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, 2. Transposing Council Directive 2000/78/ EC of the Council of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, 3. Amending the Labour Code and introducing in Book II a new title V on equality of treatment in the area of employment and work, 4. Amending articles 454 and 455 of the Criminal Code, 5. Amending the law of 12 September 2003 on disabled persons,[4] Art. 1(3) and 2(3)	Indirect discrimination occurs when an apparently neutral provision, criterion or practice is likely to result in a particular disadvantage for people of a nationality, who belong (or not), whether in reality or supposedly, to a given race or are of a particular ethnic origin, or on the basis of sex, sexual orientation, religion or belief, a handicap or age, relative to other people, unless this provision, criterion or practice can be objectively justified and that the means to carry out this objective are appropriate and necessary.
	X		Law of 29 November 2006, 1. The amended law of 16 April 1979 establishing the general statute of state civil servants, 2 The amended law of 24 December 1985 establishing the general statute of municipal civil servants,[5] Art. 1b and 18	Indirect discrimination occurs when an apparently neutral provision, criterion or practice is likely to result in a particular disadvantage for people of a nationality, who belong (or not), whether in reality or supposedly, to a given race or are of a particular ethnic origin, or on the basis of sex, sexual orientation, religion or belief, a handicap or age, relative to other people, unless this provision, criterion or practice can be objectively justified and that the means to carry out this objective are appropriate and necessary.
MALTA	X		Equal Treatment in Employment Regulations of 5 November 2004, Art. 3	Indirect discriminatory treatment shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a particular race or ethnic origin or having a particular religion or religious belief, disability, age, or sexual orientation at a disadvantage when compared with other persons.
	X		Equal Treatment of Persons Order of 2007 of 3 April 2007, Art. 2	Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put a person at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

4 General Discrimination Law regarding private relations.
5 Public sector Law regarding public services.

COUNTRY	Yes	No	Legislation covering the five discrimination grounds (Directives 43 and 78)	Definition
MALTA	X		Equality for Men and Women Act of 9 December 2003, Art. 2	Discrimination includes any treatment based on a provision, criterion or practice which would put persons at a particular disadvantage compared with persons of the other sex or sexual orientation, age, religion or belief, racial or ethnic origin, or gender identity, gender expression or sex characteristics unless the said provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.
	X		United Nations Convention on the Rights of Persons with Disabilities Act 2021 of 17 August 2021, Fourth schedule	A person shall be discriminating with another person on the grounds of disability if he subjects such other person to a particular disadvantage through an apparently neutral provision, criterion or practice.
NETHERLANDS	X		General Equal Treatment Act of 2 March 2004, Art. 1(1)c) and 2(1)	Art. 1(1)(c): 'indirect distinction: where an apparently neutral provision, criterion or practice puts persons with a particular religion, belief, political opinion, race, sex, nationality, hetero- or homosexual orientation or civil status at a particular disadvantage compared with other persons' Art. 2(1): 'the prohibition of making a distinction provided for in this act does not apply to an indirect distinction if that distinction is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'.
	X		Disability Discrimination Act of 3 April 2003, Art. 1c) and 3(2)	Art. 1(c): 'indirect distinction: where an apparently neutral provision, criterion or practice puts persons with a disability or chronic disease at a particular disadvantage compared with other persons' Art. 3(2): 'the prohibition of making a distinction provided for in this act does not apply to an indirect distinction if that distinction is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'.
	X		Age Discrimination Act of 17 December 2003, Art. 1(c) and 7(1)(c)	Art. 1(c): 'indirect distinction: where an apparently neutral provision, criterion or practice puts persons of a certain age at a particular disadvantage compared with other persons' Art. 7(1)(c): 'the prohibition of making a distinction does not apply if the distinction is [...] objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'.
	X		Civil Code of 22 November 1991, Art. 7:646(5)(c) and 7:646(10)	Art. 7:646(5)(c): 'indirect distinction: where an apparently neutral provision, criterion or practice puts persons of a certain sex at a particular disadvantage compared with other persons' Art. 7:646(10): 'the prohibition of making a distinction provided for in [this article] does not apply to an indirect distinction if that distinction is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'.
POLAND	X		Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment of 3 December 2010, Art. 3.2	Indirect discrimination means situations, where an apparently neutral provision, applied criterion or taken action would expose natural person to a particular adverse disproportions or particularly adverse situation for this person due to sex, race, ethnic origin, nationality, religion, denomination, beliefs, disability, age or sexual orientation, unless that provision, criterion or action is objectively justified by a legitimate aim that is to be accomplished and the means of achieving that aim are appropriate and necessary.

COUNTRY	Yes	No	Legislation covering the five discrimination grounds (Directives 43 and 78)	Definition
POLAND	X		Act on the Labour Code of 14 November 2003, Art. 18^{3a} § 4	Indirect discrimination exists when, due to an apparently neutral provision, criterion used or practice/action undertaken, unfavourable differences or particular disadvantage occur or could occur in terms of the establishment and termination of employment, conditions of employment, promotion, and access to training for enhancing professional qualifications, for all or a large number of employees who are members of a group distinguished on one or more of the grounds referred to in § 1, unless that decision, criterion or action is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.
PORTUGAL	X		Labour Code of 12 February 2009, Art. 23(1)(b)	When an apparently neutral provision, criterion or practice would put a person with one of the grounds of discrimination in a less advantageous situation compared with other persons.
	X		Law No. 93/2017 which establishes the legal regime for the prevention, prohibition and combating of discrimination on the grounds of race or ethnic origin, colour, nationality, ancestry and place of origin of 23 August 2017, Art. 3(1)	Indirect discrimination occurs, due to racial or ethnic origin and other grounds (nationality, ancestry and place of origin), whenever an apparently neutral provision, criterion or practice places a person or a group in a less advantageous situation than other persons.
	X		Law No. 46/2006 which prohibits and punishes discrimination based on disability and on a pre-existing risk to health of 28 August 2006, Art. 3(b)	When an apparently neutral provision, criterion or practice places a person or a group in a less advantageous situation than other persons.
	X		Law No. 93/2017 which establishes the legal regime for the prevention, prohibition and combating of discrimination on the grounds of race or ethnic origin, colour, nationality, ancestry and place of origin of 23 August 2017, Art. 5(2)(b)	When an apparently neutral provision, criterion or practice would put a person with one of the grounds of discrimination in a less advantageous situation compared with other persons.
ROMANIA	X		Ordinance (GO) 137/2000 regarding the prevention and the punishment of all forms of discrimination of 31 August 2000, Art. 2(3)	Any provisions, criteria or practices apparently neutral which disadvantage certain persons on grounds of one of the protected grounds from para. (1), unless these practices, criteria and provisions are objectively justified by a legitimate aim and the methods used to reach that purpose are appropriate and necessary.
SLOVAKIA	X		Act No. 365/2004 on Equal Treatment in Certain Areas and Protection Against Discrimination (Anti-discrimination Act) of 20 May 2004, Section 2a(3) and 2(1)[6]	Indirect discrimination means 'an apparently neutral regulation, decision, instruction or practice that puts or could put a person at a disadvantage as compared with another person, unless such regulation, decision, instruction or practices are objectively justified by following a legitimate aim and are appropriate and necessary to achieving that aim.

6 Section 2a(3) in conjunction with Section 2(1) (a general provision prohibiting discrimination). The grounds covered are sex, religion or belief, race, affiliation with a nationality or an ethnic group, disability, age, sexual orientation, marital status and family status, colour of skin, language, political or other opinion, national or social origin, property, lineage/gender or other status, or the reason of reporting criminality or other anti-social activity contained in Section 2(1) of the Anti-discrimination Act.

COUNTRY	Yes	No	Legislation covering the five discrimination grounds (Directives 43 and 78)	Definition
SLOVENIA	X		Protection Against Discrimination Act of 21 April 2016, Art. 6(2)	Indirect discrimination on grounds of personal characteristics occurs when a seemingly neutral provision, criterion or practice in equal or comparable situations and under similar conditions, puts, put or could have put an individual or a group with a certain personal characteristic in a less favourable position in comparison with other persons, unless that provision, criterion or practice is objectively based on a legitimate aim and the means of achieving that aim are appropriate and necessary.
SPAIN	X		Royal Legislative Decree 1/2013, of 29 November, Which Approves the Revised Text of the General Law of Rights of Persons with Disabilities and Their Social Inclusion of 29 November 2013, Art. 2	Indirect discrimination exists if a legal or regulatory provision, a clause in an agreement or contract, an individual agreement, a unilateral decision, a criterion or practice, or an environment, product or service, ostensibly neutral, is liable to create a particular disadvantage for one person compared with others on grounds of or by reason of disability, provided that, objectively, it does not satisfy a legitimate aim and the means of achieving that aim are not appropriate and necessary.'
	X		Law 62/2003 on Fiscal Measures, Administrative and Social Order of 30 December 2003, Art. 28 (in relation to Art. 34)	Indirect discrimination exists if a legal or regulatory provision, a clause in an agreement or contract, an individual agreement, a unilateral decision, ostensibly neutral, is liable to create a particular disadvantage for one person compared with others on grounds of or by reason of disability, provided that, objectively, it does not satisfy a legitimate aim and the means of achieving that aim are not appropriate and necessary.
SWEDEN	X		Discrimination Act (2008:567) of 5 June 2008, Chapter 1, Section 4.2	Indirect discrimination: that someone is disadvantaged by the application of a provision, a criterion or a procedure that appears neutral but that may put people of a certain sex, a certain transgender identity or expression, a certain ethnicity, a certain religion or other belief, a certain disability, a certain sexual orientation or a certain age at a particular disadvantage, unless the provision, criterion or procedure has a legitimate purpose and the means that are used are appropriate and necessary to achieve that purpose.

Annex II: Comparative table 'Legislation protecting against indirect discrimination'

COUNTRY	Law specifically prohibiting indirect discrimination on the grounds covered by Directives 2000/43 and 2000/78 in the following fields:	YES	NO	Legislation and article
AUSTRIA	Employment	X		• Equal Treatment Act of 23 June 2004, §§ 17(1), 18 • Federal-Equal Treatment Act of 23 June 2004, § 13 • Act on the Employment of People with Disabilities of 11 August 2005, § 7b(1)
	Social protection, including social security (both statutory and occupational) and healthcare	X		• Federal level: No • Province level: Yes for all provincial legislation
	Access to goods and services	X		• Equal Treatment Act of 23 June 2004,[1] § 31(1) • Federal Disability Equality Act of 23 June 2004,[2] § 4(1) • All provincial anti-discrimination legislation[3]
	Social advantages	X		• Federal level: No • Province level: Yes for all provincial legislation
	Education	X		• Federal level: No • Province level: Yes for all provincial legislation

1 On ethnic affiliation – goods and services.
2 On disability – goods and services.
3 All grounds – all fields (scope of Directive 2000/43).

COUNTRY	Law specifically prohibiting indirect discrimination on the grounds covered by Directives 2000/43 and 2000/78 in the following fields:	YES	NO	Legislation and article
BELGIUM[4]	Employment[5]	X		1) Act criminalising certain acts inspired by racism or xenophobia (Racial Equality Federal Act) of 31 July 1981, Arts. 4 (8), 4 (9) and 9[6] 2) Act pertaining to fight against certain forms of discrimination (General Antidiscrimination Federal Act) of 10 May 2007, Arts. 4(8), 4(9) and 9[7] 3) Flemish Region: Decree on proportionate participation in the employment market of 8 May 2002, Art. 2(9)[8] 4) Walloon Region: Decree on the Fight Against Certain Forms of Discrimination of 6 November 2008, Arts. 4(8), 4(9) and 9[9] 5) Region of Brussels-Capital: Ordinance related to the Fight Against Discrimination and Equal Treatment in the Employment field of 4 September 2008, Arts. 4(3), 4(8) and 9[10] 6) Region of Brussels-Capital: Framework Ordinance to ensure a Diversity Policy and to combat discrimination in the local Brussels Civil Service of 25 April 2019, Arts. 4(14), 4(15) and 14[11] 7) Commission communautaire française (COCOF): Decree on the Fight Against certain forms of discrimination and on the implementation of the principle of equal treatment of 9 July 2010, Art. 5(3)[12] 8) Decree of the Commission communautaire française on equal treatment between persons in vocational training of 22 March 2007, Art. 3 §3[13] 9) Decree on the fight against certain forms of discrimination (French Community) of 12 December 2008, Arts. 3(4) and 3(5)[14] 10) Decree aimed at fighting certain forms of discrimination (German-speaking Community) of 19 March 2012, Arts. 3(4) and 3(5)[15]) 11) Decree establishing a Framework for the Flemish equal opportunities and equal treatment policy (Flemish Community/ Region) of 10 July 2008, Art. 16, § 2[16] 12) Ordinance to promote diversity and combat discrimination in the Brussels regional civil service of 4 September 2008, Arts. 4(7)° and 11[17] 13) Region of Brussels-Capital: Ordinance to combat certain forms of discrimination and promote equal treatment of 5 October 2017, Arts. 5(5), 5(6) and 12[18]

4 The fight against discrimination is not a 'matter' in itself, which would fall within the exclusive competence of the Federal State, the Communities or the Regions, but a shared competence: it is exclusively up to the Federal State, the Communities or the Regions to adopt the measures necessary to prevent and punish discrimination in their areas of competence.

5 Labour law as such falls within the competence of the federal authority as a matter of principle, and it is therefore federal laws that apply in this area. Employment relationships that fall under the jurisdiction of the communities and regions (e.g., community or regional civil service), or even specifically of the communities (education), fall under the corresponding community or regional decrees or ordinances.

6 Race and ethnic origin.

7 Age, sexual orientation, religious or philosophical belief, disability.

8 Alleged race, ethnic origin, religion or belief, disability, age and sexual orientation.

9 Alleged race, ethnic origin, religion or belief, disability, age and sexual orientation.

10 Alleged race, religious or philosophical belief, disability, age, sexual orientation.

11 Alleged race, religious or philosophical belief, disability, age, sexual orientation.

12 Alleged race, religious or philosophical belief, disability, age, sexual orientation.

13 Alleged race, religious or philosophical belief, disability, age, sexual orientation.

14 Alleged race, religious or philosophical belief, disability, age, sexual orientation.

15 Alleged race, religious or philosophical belief, disability, age, sexual orientation.

16 Alleged race, religious or philosophical belief, disability, age, sexual orientation.

17 Alleged race, religious or philosophical belief, disability, age, sexual orientation.

18 Alleged race, religious or philosophical belief, disability, age, sexual orientation.

COUNTRY	Law specifically prohibiting indirect discrimination on the grounds covered by Directives 2000/43 and 2000/78 in the following fields:	YES	NO	Legislation and article
BELGIUM	Social protection, including social security (both statutory and occupational) and healthcare[19]	X		See Nos 1, 2, 4, 7, 9, 10, 11 and 13 of the list above regarding the field of employment
	Access to goods and services[20]	X		See Nos 1,2,4,7,9,10,11 and 13 of the list above regarding the field of employment and add: Brussels Housing Code, Ordinance of 17 July 2003, Arts. 193(4), 193(5) and 197
	Social advantages[21]	X		See Nos 1, 2, 4, 7, 9, 10, 11, 13 of the list above regarding the field of employment
	Education[22]	X		See 1, 2, 9, 10, 11 of the list regarding the field of employment
BULGARIA[23]	Employment	X		Protection Against Discrimination Act (PADA) of 16 September 2003, Art. 4 (1) and (3) in conjunction with Art. 6 (2)
	Social protection, including social security (both statutory and occupational) and healthcare	X		Protection Against Discrimination Act (PADA) of 16 September 2003, Art. 4 (1) and (3) in conjunction with Art. 6 (2)
	Access to goods and services	X		Protection Against Discrimination Act (PADA) of 16 September 2003, Art. 4 (1) and (3) in conjunction with Art. 6 (2)
	Social advantages	X		Protection Against Discrimination Act (PADA) of 16 September 2003, Art. 4 (1) and (3) in conjunction with Art. 6 (2)
	Education	X		Protection Against Discrimination Act (PADA) of 16 September 2003, Art. 4 (1) and (3) in conjunction with Art. 6 (2)
CROATIA	Employment	X		Anti-discrimination Act of 9 July 2008, Arts. 1, 2, 8 and 9[24]
	Social protection, including social security (both statutory and occupational) and healthcare	X		Anti-discrimination Act of 9 July 2008, Arts. 1, 2, 8, and 9[25]
	Access to goods and services	X		Anti-discrimination Act of 9 July 2008, Arts. 1, 2, 8, and 9[26]
	Social advantages	X		Anti-discrimination Act of 9 July 2008, Arts. 1, 2, 8,9[27]
	Education	X		Anti-discrimination Act of 9 July 2008, Arts. 1, 2, 8,9[28]

19 Social security, in the meaning of the European directives, is essentially a competence of the federal authority. By exception, however, family allowances fall under the competence of the Communities and their legislation. Healthcare is a shared area of competence.

20 Prohibition of discrimination in access to and supply of goods and services available to the public is dealt with by each competent authority in the sphere of its powers (for instance, public transport falls within the competence of the regions, apart from the national airport and the public railway company, which are the responsibility of the federal state).

21 'Social advantages', in the European meaning, do not correspond to a specific matter in Belgian law on the distribution of competences. Depending on the nature of the benefit, federal, Community or regional legislation will apply.

22 Education is a community matter. Only the Community decrees (French Community, Flemish Community, German-speaking Community) apply in this matter (except very specific exceptions).

23 The Protection Against Discrimination Act (PADA) bans indirect discrimination on all protected grounds in all fields (in the exercise of all rights), implicitly including all those specified in this table.

24 The Anti-discrimination Act (ADA) in Article 1 prescribes discrimination grounds, including those covered by the Directives. It recognises indirect discrimination as a special form of discrimination and explicitly prohibits discrimination in all its forms. The ADA is applicable in all areas of life, including (explicitly) employment.

25 The ADA prohibits indirect discrimination on all grounds of discrimination covered by the Directives in all areas of life, including (explicitly) social security, including social welfare, pension and health insurance and unemployment insurance as well as healthcare.

26 The ADA prohibits indirect discrimination on all grounds of discrimination covered by the Directives in all areas of life, including (explicitly) access to and provision of goods and services.

27 The ADA prohibits indirect discrimination on all grounds of discrimination covered by the Directives in all areas of life including (explicitly) social security, including social welfare, pension and health insurance and unemployment insurance.

28 The ADA prohibits indirect discrimination on all grounds of discrimination covered by the Directives in all areas of life including (explicitly) education.

COUNTRY	Law specifically prohibiting indirect discrimination on the grounds covered by Directives 2000/43 and 2000/78 in the following fields:	YES	NO	Legislation and article
CYPRUS	Employment	X		• Law on Equal Treatment in Employment and Occupation N. 58(I)/2004 of 30 April 2004, Art. 6(1)(b) • Law on Equal Treatment (Racial or Ethnic Origin) N. 59(I)/2004 of 30 April 2004, Art. 5(2)(b) • Law on persons with disability N. 127(I)/2000 of 21 July 2000, Art. 5.
	Social protection, including social security (both statutory and occupational) and healthcare	X		Law on Equal Treatment (Racial or Ethnic Origin) N. 59(I)/2004 of 30 April 2004, Art. 5(2)(b)[29]
	Access to goods and services	X		Law on Equal Treatment (Racial or Ethnic Origin) N. 59(I)/2004 of 30 April 2004, Art. 5(2)(b)[30]
	Social advantages	X		Law on Equal Treatment (Racial or Ethnic Origin) N. 59(I)/2004 of 30 April 2004, Art. 5(2)(b)[31]
	Education	X		Law on Equal Treatment (Racial or Ethnic Origin) N. 59(I)/2004 of 30 April 2004, Art. 5(2)(b)[32]
CZECHIA	Employment	X		Anti-Discrimination Act (ADA) of 23 April 2009, Section 3 (1) together with Section 1 (1) (a) ADA.
	Social protection, including social security (both statutory and occupational) and healthcare	X		Anti-Discrimination Act of 23 April 2009, Section 3 (1) together with Section 1 (1) (f) ADA
	Access to goods and services	X		Anti-Discrimination Act of 23 April 2009, Section 3 (1) together with Section 1 (1) (j) ADA
	Social advantages	X		Anti-Discrimination Act of 23 April 2009, Section 3 (1) together with Section 1 (1) (g) ADA
	Education	X		Anti-Discrimination Act of 23 April 2009, Section 3 (1) together with Section 1 (1) (i) ADA
DENMARK	Employment	X		Act on the Prohibition of Discrimination in the Labour Market etc. of 24 May 1996, Section 1(3)
	Social protection, including social security (both statutory and occupational) and healthcare[33]	X		• Act on Ethnic Equal Treatment of 28 May 2003, Section 3(3)[34] • Act on the Prohibition of Discrimination due to Disability of 8 June 2018, Section 5(3)[35]
	Access to goods and services[36]	X		• Act on Ethnic Equal Treatment of 28 May 2003, Section 3(3) • Act on the Prohibition of Discrimination due to Disability of 8 June 2018, Section 5(3) • Act No. 2591 on Gender Equality of 28 December 2021 (added discrimination ground of sexual orientation), Section 1a(1)(2)
	Social advantages[37]	X		• Act on Ethnic Equal Treatment of 28 May 2003, Section 3(3) • Act on the Prohibition of Discrimination due to Disability of 8 June 2018, Section 5(3)

29 Indirect discrimination is prohibited in social protection only on the ground of racial and ethnic origin.
30 Indirect discrimination is prohibited in access to goods and services only in the field of racial and ethnic origin.
31 Indirect discrimination is prohibited in social advantages (translated as 'social provisions') only on the ground of racial and ethnic origin.
32 Indirect discrimination is prohibited in education only on the ground of racial and ethnic origin.
33 The discrimination grounds of age, sexual orientation and religion or belief do not currently enjoy protection in the area of social protection.
34 The Act on Ethnic Equal Treatment covers the grounds of race and ethnic origin.
35 The Act on Prohibition of Discrimination due to Disability covers the ground of disability.
36 The discrimination grounds of age and religion or belief do not currently enjoy protection in the area of access to goods and services.
37 The discrimination grounds of age, sexual orientation and religion or belief do not currently enjoy protection in the area of social advantages.

COUNTRY	Law specifically prohibiting indirect discrimination on the grounds covered by Directives 2000/43 and 2000/78 in the following fields:	YES	NO	Legislation and article
DENMARK	Education[38]	X		• Act on Ethnic Equal Treatment of 28 May 2003, Section 3(3) • Act on the Prohibition of Discrimination due to Disability of 8 June 2018, Section 5(3)
ESTONIA	Employment	X		Equal Treatment Act of 11 December 2008, Art. 3 (4)
	Social protection, including social security (both statutory and occupational) and healthcare		X[39]	
	Access to goods and services		X	
	Social advantages		X	
	Education		X	
FINLAND	Employment	X		Non-Discrimination Act of 30 December 2014, Sections 2 and 8
	Social protection, including social security (both statutory and occupational) and healthcare	X		Non-Discrimination Act of 30 December 2014, Sections 2 and 8
	Access to goods and services	X		Non-Discrimination Act of 30 December 2014, Sections 2 and 8
	Social advantages	X		Non-Discrimination Act of 30 December 2014, Sections 2 and 8
	Education	X		Non-Discrimination Act of 30 December 2014, Sections 2 and 8
FRANCE	Employment	X		Law No. 2008-496 of 27 May 2008 relating to the adaptation of National Law to Community Law in matters of discrimination, Arts. 1 and 2
	Social protection, including social security (both statutory and occupational) and healthcare	X		Law No. 2008-496 of 27 May 2008 relating to the adaptation of National Law to Community Law in matters of discrimination, Art. 2 par 2
	Access to goods and services	X		Law No. 2008-496 of 27 May 2008 relating to the adaptation of National Law to Community Law in matters of discrimination, Art. 2 par 3
	Social advantages	X		Law No. 2008-496 of 27 May 2008 relating to the adaptation of National Law to Community Law in matters of discrimination, Art. 2 par 3
	Education	X		Law No. 2008-496 of 27 May 2008 relating to the adaptation of National Law to Community Law in matters of discrimination, Art. 2 par 3
GERMANY	Employment	X		General Law on Equal Treatment (AGG) of 14 August 2006, Section 2.1.1 – 3, Section 3.2
	Social protection, including social security (both statutory and occupational) and healthcare	X		• General Law on Equal Treatment of 14 August 2006, Section 2.1.5 • Social Code I, (SGB I) of 11 December 1975, Section 33c[40] • Social Code IV, (SGB IV) of 12 November 2009, Section 19a • Basic Law, Art. 3[41]

38 The discrimination grounds of age, sexual orientation and religion or belief do not currently enjoy protection in the area of education.

39 The scope of the Equal Treatment Act is different for grounds of nationality (ethnic origin), race or colour on the one hand and the grounds of religion, other beliefs, age, disability and sexual orientation on the other. In case of nationality, race and colour, indirect discrimination is prohibited with regard to access to the services of social welfare, social security and healthcare, including social benefits; the rest of the grounds enjoy the more limited scope.

40 The Social Code I, Section 33c covers the grounds of race, ethnic origin and disability.

41 The German Federal Constitution, Article 3 provides an underlying constitutional guarantee in public law.

COUNTRY	Law specifically prohibiting indirect discrimination on the grounds covered by Directives 2000/43 and 2000/78 in the following fields:	YES	NO	Legislation and article
GERMANY	Access to goods and services	X		• General Law on Equal Treatment of 14 August 2006, Sections 2.1.8, and 19 (race and ethnic origin: all contracts concerning goods and services available to the public; all other grounds except belief: only contracts for 'bulk business'[42])
	Social advantages	X		• General Law on Equal Treatment of 14 August 2006, Section 2.1.6 • Social Code I (SGB I) of 11 December 1975, Section 33c • Social Code IV (SGB IV) of 12 November 2009, Section 19a • Basic Law, Art. 3
	Education	X		• General Law on Equal Treatment of 14 August 2006, Sections 2.1.7 and 19 • Basic Law, Art. 3
GREECE	Employment	X		Law 4443/2016 'On the transposition of Directive 43/2000/EC on the application of the principle of equal treatment irrespective of race and ethnic origin, and the transposition of Directive 78/2000/EC on the configuration of the general framework of equal treatment in employment and work (Equal Treatment Law 4443/2016) of 2 December 2016, Art. 2 (2) (b)
	Social protection, including social security (both statutory and occupational) and healthcare	X		Equal Treatment Law 4443/2016 of 2 December 2016, Art. 3 (2) (a)[43]
	Access to goods and services	X		Equal Treatment Law 4443/2016 of 2 December 2016, Art. 3(2) (d) and more analytically Art. 11 (1)
	Social advantages	X		Equal Treatment Law 4443/2016 of 2 December 2016, Art. 3 (2) (b)[44]
	Education	X		Equal Treatment Law 4443/2016 of 2 December 2016, Art. 3(2) (c)[45]
HUNGARY	Employment	X		Act CXXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities of 28 December 2003, Arts. 1, 4, 5, 7, 9 and 21
	Social protection, including social security (both statutory and occupational) and healthcare	X		Act CXXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities of 28 December 2003, Arts. 1, 4, 5, 7, 9, 24 and 25
	Access to goods and services	X		Act CXXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities of 28 December 2003, Arts. 1, 4, 5, 7, 9 and 30
	Social advantages	X		Act CXXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities of 28 December 2003, Arts. 1, 4, 5, 7 and 9
	Education	X		Act CXXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities of 28 December 2003, Arts. 1, 4, 5, 7, 9 and 27
IRELAND	Employment	X		• Employment Equality Acts 1998-2021 of 18 June 1996, Sections 31 and 29(4) • Pensions Act 1990-2018 of 24 July 1990, Section 68,

42 Bulk business means legal transactions that are typically concluded in a multitude of cases under comparable conditions without regard to the person.
43 Only for the ground of racial or ethnic origin.
44 Only for the ground of racial or ethnic origin.
45 Only for the ground of racial or ethnic origin.

COUNTRY	Law specifically prohibiting indirect discrimination on the grounds covered by Directives 2000/43 and 2000/78 in the following fields:	YES	NO	Legislation and article
IRELAND	Social protection, including social security (both statutory and occupational) and healthcare	X		Pensions Act 1990-2018 of 24 July 1990, Section 68[46]
	Access to goods and services	X		Equal Status Acts 2000-2018 of 26 April 2000, Sections 3(1)(c) and 5
	Social advantages		X[47]	
	Education	X		Equal Status Acts 2000-2018 of 26 April 2000, Sections 3(1)(c), 5 and 7
ITALY	Employment	X		• Legislative decree no. 215 implementing Directive 2000/43/EC on equality of treatment between persons irrespective of racial or ethnic origin of 9 July 2003, Art. 2(1)(B) • Legislative decree no. 216 on the implementation of Directive 2000/78/EC for equal treatment in employment and occupation of 9 July 2003, Art. 2(1)(B)
	Social protection, including social security (both statutory and occupational) and healthcare	X		• Legislative decree no. 215 implementing Directive 2000/43/EC on equality of treatment between persons irrespective of racial or ethnic origin of 9 July 2003, Art. 2(1)(B)[48] • Legislative decree no. 67 on Provisions on the judicial protection of persons with disabilities who are victims of discrimination of 1st March 2006, Art. 2(3)[49]
	Access to goods and services	X		• Legislative decree no. 215 implementing Directive 2000/43/EC on equality of treatment between persons irrespective of racial or ethnic origin of 9 July 2003, Art. 2(1)(B)[50] • Legislative decree no. 67 of 1st March 2006 on Provisions on the judicial protection of persons with disabilities who are victims of discrimination, Art. 2(3)[51]
	Social advantages	X		• Legislative decree no. 215 implementing Directive 2000/43/EC on equality of treatment between persons irrespective of racial or ethnic origin of 9 July 2003, Art. 2(1)(B)[52] • Legislative decree no. 67 on Provisions on the judicial protection of persons with disabilities who are victims of discrimination of 1st March 2006, Art. 2(3)[53]

46 The Pensions Act prohibits indirect discrimination with respect to occupational pensions on all five grounds. The Equal Status Acts do not specifically prohibit discrimination in the field of social protection. Case law has established that healthcare and social security benefits are 'services' for the purposes of Section 5, which prohibits discrimination in access to goods and services provided by public and private bodies. However, discriminatory treatment that is required by law is exempt from challenge (Section 14(1)(a), meaning that much indirect discrimination in statutory social security is in effect not prohibited under the Equal Status Acts.

47 The Equal Status Acts do not specifically prohibit discrimination in the field of social advantages. Case law has established that social advantages are 'services' for the purposes of Section 5, which prohibits discrimination in access to goods and services provided by public and private bodies. However, discriminatory treatment that is required by law is exempt from challenge (Section 14(1)(a), meaning that indirect discrimination re social advantages provided for by law is in effect not prohibited under the Equal Status Acts.

48 The scope of application of the prohibition of indirect discrimination on the ground of race and ethnic origin includes social security (both statutory and occupational) and healthcare.

49 The prohibition of indirect discrimination on the ground of disability has a general scope of application.

50 The scope of application of the prohibition of indirect discrimination on the ground of race and ethnic origin includes access to goods and services.

51 The prohibition of indirect discrimination on the ground of disability has a general scope of application.

52 The scope of application of the prohibition of indirect discrimination on the ground of race and ethnic origin includes social advantages.

53 The prohibition of indirect discrimination on the ground of disability has a general scope of application.

COUNTRY	Law specifically prohibiting indirect discrimination on the grounds covered by Directives 2000/43 and 2000/78 in the following fields:	YES	NO	Legislation and article
ITALY	Education	X		• Legislative decree no. 215 implementing Directive 2000/43/EC on equality of treatment between persons irrespective of racial or ethnic origin of 9 July 2003, Art. 2(1)(B)[54] • Legislative decree no. 67 on Provisions on the judicial protection of persons with disabilities who are victims of discrimination of 1st March 2006, Art. 2(3)[55]
LATVIA	Employment	X		• Labour Law of 20 February 2001, Arts. 29(6) and 29(9) • Law on the Prohibition of Discrimination of Physical Persons • Parties to Legal Transaction, (Article 4(2))
	Social protection, including social security (both statutory and occupational) and healthcare	X		• Law on Social Security of 7 September 1995, Art. 2.[1](4)[56]
	Access to goods and services	X		Consumer Rights Protection Law of 18March 1999, Art. 3.[1](6)[57]
	Social advantages	X		Law on Social Security of 7 September 1995, Art. 2.[1](4)[58]
	Education	X		Law on Education of 29 October 1998, Art. 3.[1] (1,8)[59]
LITHUANIA	Employment	X		• Law on Equal Treatment of 18 November 2003, Art. 2(5) • Labour Code of 14 September 2016, Art. 26(1)
	Social protection, including social security (both statutory and occupational) and healthcare		X[60]	
	Access to goods and services	X		Law on Equal Treatment of 18 November 2003, Art. 8(1)
	Social advantages		X[61]	
	Education	X		Law on Equal Treatment of 18 November 2003, Art. 6

54 The scope of application of the prohibition of indirect discrimination on the ground of race and ethnic origin includes education.
55 The prohibition of indirect discrimination on the ground of disability has a general scope of application.
56 Protected grounds (in all aspects of the social security system): race, ethnicity, skin colour, age, disability, religious, political or other conviction, national or social origin, property or family status, or other circumstances.
57 Protected grounds: race/ethnicity, disability and gender.
58 Protected grounds: race, ethnicity, skin colour, age, disability, religious, political or other conviction, national or social origin, property or family status, or other circumstances.
59 Protected grounds: material and social status, race, nationality, ethnic origin, gender, religious and political affiliation, health condition, occupation, and place of residence.
60 There is a lack of clarity in the Law on Equal Treatment on the prohibition of discrimination in the field of social protection, including social security and healthcare. Lack of clarity causes inconsistencies and problems in the practical application of the law. There is no court case law that would help the interpretation of prohibition of discrimination on the grounds of race or ethnic origin.
61 National anti-discrimination law does not explicitly address social advantages. The existing Law on Equal Treatment does not explicitly state that social benefits fall under the scope of the law. There have not been any court cases regarding the application of national non-discrimination law in the field of social advantages.

COUNTRY	Law specifically prohibiting indirect discrimination on the grounds covered by Directives 2000/43 and 2000/78 in the following fields:	YES	NO	Legislation and article
LUXEMBOURG	Employment	X		• Law of 28 November 2006, 1. Transposing Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, 2. Transposing Council Directive 2000/78/ EC of the Council of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, 3.Amending the Labour Code and introducing in Book II a new title V on equality of treatment in the area of employment and work, 4. Amending articles 454 and 455 of the Criminal Code, 5. Amending the law of 12 September 2003 on disabled persons,[62] Arts. 1b and 18 • Law of 29 November 2006, 1. The amended law of 16 April 1979 establishing the general statute of state civil servants, 2 The amended law of 24 December 1985 establishing the general statute of municipal civil servants[63]), Arts. 1(3) and 2(3)
	Social protection, including social security (both statutory and occupational) and healthcare	X		General discrimination Law of 28 November 2006, Art. 2(1)(e)
	Access to goods and services	X		General discrimination Law of 28 November 2006, Art. 2(1)(h)
	Social advantages	X		General discrimination Law of 28 November 2006, Art. 2(1)(f)
	Education	X		General discrimination Law of 28 November 2006, Art. 2(1)(g)
MALTA	Employment	X		• Equal Treatment in Employment Regulations of 5 November 2004, Regulation 3(2)(b) • United Nations Convention on the Rights of Persons with Disabilities Act 2021 of 17 August 2021, Second Schedule Article 27, Fourth Schedule • Equality for Men and Women Act 2003 of 9 December 2003,[64] Art. 4
	Social protection, including social security (both statutory and occupational) and healthcare	X		• Equality for Men and Women Act 2003 of 9 December 2003, Art. 4 • United Nations Convention on the Rights of Persons with Disabilities Act 2021 of 17 August 2021, Fourth Schedule
	Access to goods and services	X		• Equal Treatment of Persons Order 2007 of 3 April 2007,[65] Art. 4 • United Nations Convention on the Rights of Persons with Disabilities Act 2021 of 17 August 2021, Fourth Schedule
	Social advantages	X		Equal Treatment of Persons Order 2007 of 3 April 2007,[66] Art. 4
	Education	X		Equal Treatment of Persons Order 2007 of 3 April 2007,[67] Art. 4 United Nations Convention on the Rights of Persons with Disabilities Act 2021 of 17 August 2021, Fourth Schedule

62 General Discrimination Law regarding private relations.
63 Public sector Law regarding public services.
64 This law prohibits discrimination on the basis of sex, family responsibilities, sexual orientation, age, religion or belief, racial or ethnic origin, gender identity, actual or potential pregnancy or childbirth and its material scope covers employment, self-employment, education and provision of services.
65 Covering only racial and ethnic origin.
66 Covering only racial and ethnic origin.
67 Covering only racial and ethnic origin.

COUNTRY	Law specifically prohibiting indirect discrimination on the grounds covered by Directives 2000/43 and 2000/78 in the following fields:	YES	NO	Legislation and article
NETHERLANDS	Employment	X		• General Equal Treatment Act of 2 March 2004, Art. 1(1)(c) • Disability Discrimination Act of 3 April 2003, Art. 1(c) • Age Discrimination Act of 17 December 2003, Art. 1(c) • Civil Code of 22 November 1991, Art. 7:646(5)(c)
	Social protection, including social security (both statutory and occupational) and healthcare	X		• General Equal Treatment Act of 2 March 2004,[68] Arts 7(1)(c) and 7a(1) • Disability Discrimination Act of 3 April 2003,[69] Art. 5b(1)(c)
	Access to goods and services	X		• General Equal Treatment Act of 2 March 2004,[70] Art. 7(1) • Disability Discrimination Act of 3 April 2003, Art. 5b(1)
	Social advantages	X		• General Equal Treatment Act of 2 March 2004, Art. 7a(1)[71]
	Education	X		• General Equal Treatment Act of 2 March 2004,[72] Art. 7(1)(c) • Disability Discrimination Act of 3 April 2003, Art. 5b(1)(c)
POLAND	Employment	X		• Act on the Labour Code (implementation amendment) of 14 November 2003, Art. 183a §4[73] • Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment of 3 December 2010 (Equal Treatment Act), Art. 3.2, 4[74]
	Social protection, including social security (both statutory and occupational) and healthcare	X		Equal Treatment Act of 3 December 2010, Art. 6 (social protection, including social security) and Art. 7 (healthcare)[75]
	Access to goods and services	X		Equal Treatment Act of 3 December 2010, Art. 6[76]
	Social advantages	X		Equal Treatment Act of 3 December 2010, Art. 6[77]
	Education	X		Equal Treatment Act of 3 December 2010, Art. 7[78]
PORTUGAL	Employment	X		• Law No. 7/2009 of 12 February 2009 (Labour Code), Art. 23 (1) (b) • Law No. 46/2006 which prohibits and punishes discrimination based on disability and on a pre-existing risk to health of 28 August 2006, Arts. 1 and 5-Law 3/2011, which forbids any discrimination in access to and the exercise of self-employment, and transposes into national law Directives 2000/43/EC, 2000/78/EC and 2006/54/EC of 15 February 2011, Art. 5 (1)
	Social protection, including social security (both statutory and occupational) and healthcare	X		Law No. 93/2017 which establishes the legal regime for the prevention, prohibition and combating of discrimination on the grounds of race or ethnic origin, colour, nationality, ancestry and place of origin of 23 August 2017, Arts. 1, 3 (1) (c) 2 (1) (a)

68 The GETA prohibits: -indirect discrimination on the grounds of racial or ethnic origin, religion or belief and sexual orientation in the field of healthcare; and indirect discrimination on the ground of racial or ethnic origin in the field of social protection (including social security, statutory and occupational).
69 The DDA prohibits indirect discrimination on the ground of disability in health care.
70 The grounds covered are racial or ethnic origin, religion or belief, and sexual orientation.
71 The only grounds covered are racial or ethnic origin.
72 The grounds covered are racial or ethnic origin, religion or belief, and sexual orientation.
73 The grounds covered by the Labour Code are gender, age, disability, race, religion, nationality, political opinion, membership of a trade union, ethnic origin, belief, sexual orientation, employment for a definite or indefinite period of time, employment part-time or full-time; the list remains open.
74 The grounds covered by the article are: gender, race, ethnic origin, nationality, citizenship, religion, belief, political opinion, disability, age and sexual orientation.
75 Only for the grounds of racial and ethnic origin.
76 Only for the grounds of racial and ethnic origin.
77 Only for the grounds of racial and ethnic origin.
78 Only for the grounds of racial and ethnic origin.

COUNTRY	Law specifically prohibiting indirect discrimination on the grounds covered by Directives 2000/43 and 2000/78 in the following fields:	YES	NO	Legislation and article
PORTUGAL	Access to goods and services	X		Law No. 93/201 which establishes the legal regime for the prevention, prohibition and combating of discrimination on the grounds of race or ethnic origin, colour, nationality, ancestry and place of origin of 23 August 2017, Arts. 1, 3 (1) (c), 2 (1) (d)
	Social advantages	X		Law No. 93/2017 which establishes the legal regime for the prevention, prohibition and combating of discrimination on the grounds of race or ethnic origin, colour, nationality, ancestry and place of origin of 23 August 2017, Arts. 1, 3 (1) (c), 2 (1) (b)
	Education	X		Law No. 93/2017 which establishes the legal regime for the prevention, prohibition and combating of discrimination on the grounds of race or ethnic origin, colour, nationality, ancestry and place of origin of 23 August 2017, Arts. 1, 3(1) (c), 2 (1) (c)
ROMANIA	Employment	X		Ordinance (GO) 137/2000 regarding the prevention and the punishment of all forms of discrimination of 31 August 2000, Art. 2(3)
	Social protection, including social security (both statutory and occupational) and healthcare		X	The prohibition of indirect discrimination is phrased in general terms covering all grounds (beyond the grounds of racial or ethnic origin, religion or belief, disability, age and sexual orientation) and going beyond the material scope of Directive 2000/78.
	Access to goods and services		X	The prohibition of indirect discrimination is phrased in general terms covering all grounds (beyond the grounds of racial or ethnic origin, religion or belief, disability, age and sexual orientation) and going beyond the material scope of Directive 2000/78.
	Social advantages		X	The prohibition of indirect discrimination is phrased in general terms covering all grounds (beyond the grounds of racial or ethnic origin, religion or belief, disability, age and sexual orientation) and going beyond the material scope of Directive 2000/78.
	Education		X	The prohibition of indirect discrimination is phrased in general terms covering all grounds (beyond the grounds of racial or ethnic origin, religion or belief, disability, age and sexual orientation) and going beyond the material scope of Directive 2000/78.
SLOVAKIA	Employment	X		Act No. 365/2004 on Equal Treatment in Certain Areas and Protection Against Discrimination (Anti-discrimination Act) of 20 May 2004, Section 2a(3) in conjunction with Sections 2 (1) and 3 (1)
	Social protection, including social security (both statutory and occupational) and healthcare	X		Act No. 365/2004 on Equal Treatment in Certain Areas and Protection Against Discrimination (Anti-discrimination Act) of 20 May 2004, Section 2a(3) in conjunction with Sections 2 (1) and 3 (1)
	Access to goods and services	X		Act No. 365/2004 on Equal Treatment in Certain Areas and Protection Against Discrimination (Anti-discrimination Act) of 20 May 2004, Section 2a(3) in conjunction with Sections 2 (1) 3 (1)

COUNTRY	Law specifically prohibiting indirect discrimination on the grounds covered by Directives 2000/43 and 2000/78 in the following fields:	YES	NO	Legislation and article
SLOVAKIA	Social advantages	X		Act No. 365/2004 on Equal Treatment in Certain Areas and Protection Against Discrimination (Anti-discrimination Act) of 20 May 2004, Section 2a(3) in conjunction with Sections 2 (1) 3 (1)
	Education	X		Act No. 365/2004 on Equal Treatment in Certain Areas and Protection Against Discrimination (Anti-discrimination Act) of 20 May 2004, Section 2a(3) in conjunction with Sections 2 (1) and 3 (1)
SLOVENIA	Employment	X		Protection against Discrimination Act of 21 April 2016, Art. 6 (2) Employment Relationship Act of 5 March 2013, Art. 6(3)
	Social protection, including social security (both statutory and occupational) and healthcare	X		Protection against Discrimination Act of 21 April 2016, Art. 6 (2) in connection with Art. 2(1)
	Access to goods and services	X		Protection against Discrimination Act of 21 April 2016, Art. 6 (2) in connection with Art. 2(1)
	Social advantages	X		Protection against Discrimination Act of 21 April 2016, Art. 6 (2) in connection with Art. 2(1)
	Education	X		Protection against Discrimination Act of 21 April 2016, Art. 6 (2) in connection with Art. 2(1)
SPAIN	Employment	X		• Law 62/2003 on Fiscal Measures, Administrative and Social Order of 30 December 2003, Art. 28c in relation with Art. 34[79] • Royal Legislative Decree 2/2015, approving the revised text of the Workers' Statute Law of 23 October 2015, Arts. 4(2).c) and17(1)[80] • Law 20/2007 of 11 July 2007, on the Statute of Self-employment Work of 11 July 2007, Art. 4.3.[81] • Royal Legislative Decree 1/2013, of 29 November, Which Approves The Revised Text of the General Law of Rights of Persons With Disabilities and Their Social Inclusion of 29 November 2013, Art. 2[82]
	Social protection, including social security (both statutory and occupational) and healthcare		X[83]	
	Access to goods and services	X[84]		Organic Law 4/2000 on the Rights and Freedoms of Foreigners in Spain and their social integration of 11 January 2000, Art. 23
	Social advantages		X[85]	

79 Recognises and defines indirect discrimination.
80 Recognises the prohibition of indirect discrimination, but does not define it.
81 Recognises the prohibition of indirect discrimination, but does not define it.
82 Recognises and defines indirect discrimination.
83 In general, several social security and healthcare laws recognise the principle of equality and non-discrimination, but do not specifically regulate the prohibition of indirect discrimination.
84 It should be borne in mind that Law 17/2009, of 23 November 2009, on free access to service activities and the exercise thereof, states in Article 9 that access to a service activity or the exercise thereof shall be governed by the principle of equal treatment and non-discrimination (but does not specifically regulate the principle of indirect discrimination).
85 Law 38/2003, of 17 November 2003, (General Subsidies Act), regulates the general legal regime for subsidies granted by public administrations. It establishes that management of these subsidies is governed by the principle of non-discrimination. However, the principle of indirect discrimination is not specifically defined. On the other hand, Law 45/2015, of 14 October, on Volunteering, also states in Article 5.2 that the exercise of an action of a voluntary nature is based on the non-discrimination of volunteers on grounds of racial origin, ethnicity, religion, ideological or trade union convictions, illness, disability, age, sex, sexual identity, sexual orientation or any other personal or social condition or circumstance, amongst other reasons. This provision, however, does not specifically address the issue of indirect discrimination.

COUNTRY	Law specifically prohibiting indirect discrimination on the grounds covered by Directives 2000/43 and 2000/78 in the following fields:	YES	NO	Legislation and article
SPAIN	Education		X[86]	
SWEDEN	Employment	X		Discrimination Act (2008:567) of 5 June 2008, Chapter 1, Section 4.2[87] in connection with Chapter 2, Sections 1-4 prohibits discrimination in working life (employment)
	Social protection, including social security (both statutory and occupational) and healthcare	X		Discrimination Act (2008:567) of 5 June 2008, Chapter 1, Section 4.2 in connection with Chapter 2, Section 13 prohibits discrimination in the fields of 'Health and medical care and social services etc.' and Section 14 prohibits discrimination in the fields of 'Social insurance system, unemployment insurance and financial aid for studies.'
	Access to goods and services	X		Discrimination Act (2008:567) of 5 June 2008, Chapter 1, Section 4.2 in connection with Chapter 2, Section 12 prohibits discrimination in the fields of 'Goods, services and housing etc.'
	Social advantages	X		Discrimination Act (2008:567) of 5 June 2008, Chapter 1, Section 4.2 in connection with Chapter 2, Section 12 'Goods, services and housing etc.' Section 13 'Health and medical care and social services etc.' and Section 14 'Social insurance system, unemployment insurance and financial aid for studies.'
	Education	X		Discrimination Act (2008:567) of 5 June 2008, Chapter 1, Section 4.2 in connection with Chapter 2, Sections 5-8.

86 Organic Law 2/2006, of 3 May 2006, on Education, recognises the principle of non-discrimination in the education system, although it does not specifically regulate indirect discrimination. Indirect discrimination is only specifically recognised in the case of persons with disabilities in the university sector. In particular, Organic Law 6/2001 on Universities states that (24th additional provision): Disabled students and other disabled members of the university community may not be discriminated against on the basis of their disability either directly or indirectly in the access, admission, permanence and exercise of academic and other qualifications they are recognised as holding.

87 Chapter 1, Section 4:1-6 states that discrimination has the meaning set out in Section 4, i.e. Direct, Indirect, Inadequate accessibility, Harassment, Sexual harassment, Instructions to discriminate. Chapter 1, Section 4:2 defines indirect discrimination as a form of discrimination concerning all of the grounds.

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