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Making Equality Rights Work in Practice

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The Prohibition of Indirect Discrimination under EU Law

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What is indirect discrimination?

The prohibition of discrimination is a cornerstone of European Union law. It is therefore not surprising that the distinction between different forms of discrimination is of great relevance in its practical application. The most important distinction is that between direct and indirect discrimination. However, important as it is, this distinction does not appear in the wording of the Treaties which are the basic texts of EU law. Rather, it has been developed by the Court of Justice through its case law since the 1960s, in order to enhance the effectiveness of what was then EEC (later EC and now EU) non-discrimination law.

What is indirect discrimination? Put simply, it relates to measures that appear to be unproblematic on their face but that, due to the circumstances in which they apply, nevertheless have a discriminatory effect on a particular group of people. In other words, such measures appear acceptable on an abstract level but are problematic on a concrete level. In contrast to direct discrimination, indirect discrimination is not readily obvious but rather implicit. An 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 may therefore amount to indirect discrimination on grounds of disability. Another example: under the law of a particular country there is a general obligation to perform military service. This will pose a problem for Jehovah's Witnesses who, for religious reasons, refuse to perform military service. Yet another example: in order to be allowed to immigrate to a particular country, applicants have to pass a so-called integration test. Practice shows that people with the nationality of certain countries (and hence with certain ethnic backgrounds) are far less likely to pass the test than others. In situations such as these, there will be indirect discrimination (in the above examples, on grounds of disability, religion, nationality or racial or ethnic origin) unless there is an objective justification for the measure in question, for example if the employer requiring a driving licence can show that the job can actually not be done without it.

As these examples show, the indirect nature of the discrimination relates to how a given measure is linked to a particular discrimination ground. Indirect discrimination is worse treatment of a person or a group of persons that in substance (though not in form) is based on a prohibited discrimination ground. In contrast to direct discrimination, indirect discrimination is only indirectly based on the prohibited ground. However, it is important to note that 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 significant negative impact on social and economic status, well-being and health.

Indirect discrimination under EU law

In EU law, the prohibition of indirect discrimination plays a role wherever the law prohibits discrimination on a particular ground. In the field of social non-discrimination law, this includes in particular Art. 157(1) TFEU on equal pay for men and women and sex equality directives (Directives 97/7/EEC, 2004/113/EC, 2006/54/EC and 2010/41/EU), further the Racial Equality Directive (Directive 2000/43/EC), which concerns discrimination on grounds of race or ethnic origin, and the Employment Equality Directive (Directive 2000/78/EC), which concerns discrimination on grounds of religion or belief, disability, age and sexual orientation. Obviously, the prohibition of these types of discrimination can apply only within the field of application of the directives mentioned, which is strikingly different. Accordingly, the field within which the term 'indirect discrimination' is relevant as a matter of EU law is rather different for these directives.

The most recent generation of EU non-discrimination law not only explicitly mentions different forms of discrimination but also contains legal definitions. Under these definitions, 'indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of [a particular characteristic] 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 main characteristics of the legal concept of indirect discrimination are its effects-based nature and the element of objective justification. Regarding the former, the definitions in the modern directives refer to 'a particular disadvantage' that a measure has on a particular group as compared to another group, and which must be shown to exist by the victim of the alleged discrimination. The directives do not define what 'a particular disadvantage' precisely means, and neither does case law from the area of sex equality.

Case law does, however, distinguish between two different situations, one where 'a considerably smaller percentage of women than men' is able to satisfy the condition in question, and one where there is 'a lesser but persistent and relatively constant disparity over a long period between men and women who satisfy the requirement'.

The case law further appears to indicate that the degree of disparity must be quite high. Importantly, the directives do not necessarily require statistical proof of the required disparate impact.

Regarding objective justification, the case law of the Court of Justice shows that there is a very broad range of potentially acceptable grounds of justification. However, purely budgetary considerations can never serve as objective justification. Further, the aim relied on must be unrelated to discrimination, and mere generalisations are not sufficient in this context. As for proportionality, the requirements are very strict indeed. Proportionality requires that the concrete measure taken in the interest of the legitimate aim be both appropriate (i.e. suitable for achieving the aim in question) and necessary (i.e. another measure with a lesser effect, or even no disparate effect, would not be effective). It is therefore not sufficient that a measure is merely convenient or desirable. The legitimacy of the aim as well as the appropriateness and necessity of the measure must be shown by the person who has allegedly engaged in indirect discrimination. Indeed, the Court's recent case law on proportionality appears to be increasingly strict.

Practical application of the concept

When applying the prohibition of indirect discrimination, national authorities and courts will have to engage in a three-step analysis relating to the scope of the law, the nature of the measure as amounting to apparent indirect discrimination, and objective justification. In the framework of this analysis, the following questions must be asked and answered:

- i. 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?
- ii. If so, can the victim of the alleged discrimination prove that there is apparent indirect discrimination on a particular ground?
- iii. If so, can the perpetrator prove that there is objective justification (i.e. a legitimate aim and proportionate means employed to reach this aim) that will prevent a finding of indirect discrimination?

In practice, challenges may arise in the context of all of these questions, for example in view of the different fields of application of EU law concerning different types of discrimination, which poses a particular problem in the context of multiple discrimination.

However, national case law of the Member States shows how the prohibition of indirect discrimination can be made more effective by broadening the scope of the national law to include more situations than are required by EU law and by including more discrimination grounds. Further, in cases where it is either required or possible, difficulties may arise in gathering statistical evidence for indirect discrimination.

Under the modern directives, a comparison must be made between the effect of the contested measure on two groups, namely the group to whom the victim of the alleged discrimination belongs on the one hand, and on a comparator group on the other. In practice, in some contexts it may be difficult to find comparators or relevant and significant statistical material. For these reasons statistical proof should not be made compulsory under national law, though it must be possible to rely on it where this is useful for victims of alleged indirect discrimination. Further, where relevant and significant statistical material is available, it may be difficult to determine which figures must be taken into account in order to establish the required disparity of effect. In the latter context, the case law of the Court of Justice on sex discrimination cases indicates that a flexible and pragmatic approach is required. As regards objective justification, the authorities and courts of the Member States should be very careful not to accept such justification too easily, and they should be particularly attentive with regard to the requirement of proportionality.

Delimitation of other legal concepts

National authorities and courts that examine discrimination cases will have to be careful to distinguish indirect discrimination from other important concepts of EU non-discrimination law. Of particular importance is the distinction from direct discrimination, because of differences between the two concepts both on the level of proof and of justification. Under the Court of Justice's recent case law, certain cases that would have previously been examined in the framework of indirect discrimination are now treated as direct discrimination cases. The case law indicates that the Court has moved away from an approach where only measures that are explicitly based on the prohibited criterion or that are by nature indissociably linked to it amount to direct discrimination. Instead, direct discrimination now includes cases where reliance on a formally neutral criterion in fact affects one group only, be it by nature or on the basis of a rule that has the force of law.

Indirect discrimination is sometimes linked to concepts such as discrimination by association, positive action, and reasonable accommodation. However, this is either not necessary or not appropriate. As regards positive action, it is possible in theory to distinguish between direct and indirect positive action. However, the Court in its case law does not use such terminology. Furthermore, 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.

Finally, reasonable accommodation concerns a specific right of a worker with a disability, rather than an unspecified right to comparatively equal treatment. The breach of the obligation to provide reasonable accommodation is best conceived of as a type of discrimination *sui generis*, which does not require a distinction between direct and indirect discrimination.

Some practical questions

- Not too long ago, it was quite common that part-time workers earned less for the same effort than full-time workers. At that time, there was not EU law prohibiting discrimination on part-time work directly. Under these circumstances, could reliance on the criterion of working time nevertheless lead to prohibited discrimination?
- Two job advertisements look for “a recent graduate in law” and “a very experienced lawyer”, respectively. Why could this lead to discrimination on grounds of age?
- In the specific context of discrimination on grounds of age, does it matter whether discrimination is direct or indirect?
- Under the national law of an EU Member State, a certain benefit is granted to married couples only. Only heterosexual couples are able to marry in this particular Member State (i.e. only they can be entitled to the benefit). In your opinion, is the exclusion of homosexual couples from the benefit in question (potentially) directly or indirectly discriminatory?
- Do you know whether the non-discrimination law of your country includes an explicit prohibition of indirect discrimination and how it is defined?
- In your opinion, is it a good idea that EU law includes the prohibition not only of direct, but also of indirect discrimination?