



## **Legal Seminar 25 November 2008 on the implementation of EU law on equal opportunities and anti-discrimination**

### **DISCUSSION PAPER INDIRECT DISCRIMINATION**

*The content of this discussion paper has been drafted by the European Network of Legal Experts in the non-discrimination field and does not necessarily reflect the opinion or position of the European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities*

#### **Equality and discrimination**

Within the definitions of Art. 2 par. 2 (a) (b) of Directives 2000/43/EC (Racial Equality Directive) and 2000/78/EC (Employment Equality Directive), and Art. 2 par. 1(b) of Directive 2006/54/EC (Recast Directive) and Art. 2(b) of Directive 2004/113/EC (Services Directive) there are at least two different concepts of equality. A concept of formal equality, which is embodied in the concept of direct discrimination, and a concept of substantive equality, which is partly embodied in indirect discrimination, but also in the concepts of reasonable accommodation and positive discrimination.

Discrimination is complex, multifaceted, deeply ingrained in behaviour and difficult to measure or quantify.<sup>1</sup> Discrimination exists when some particular characteristic is used in an attempt to restrict individuals' access to the available economic, political, employment and social opportunities for advancement. The targeted discrimination groups may vary, across locations, but in general include: women, immigrants, Roma, people with disabilities, youth, elderly, people of a particular religion or belief, gay and lesbian, bisexual, transgender and transsexual people<sup>2</sup>.

As the European Court of Justice has held<sup>3</sup>, discrimination can arise not only through the application of different rules to comparable situations but also through the application of the same rule to different situations. In applying a broad approach to discrimination, Community law contributes to the implementation of equality both in law and in actual fact.

<sup>1</sup> Macpherson, D., McConnell, and Brue, S., *Contemporary Labour Economics*, (2006), McGraw – Hill.

<sup>2</sup> According to a Eurobarometer survey based on questionnaire covered by the Community Action Programme against Discrimination (57.0, 2003), in the 15 Member States, the most often cited for witnessed discrimination is racial or ethnic 22%, followed by learning difficulties or mental illness 12%, physical disability 11%, religion or beliefs 9%, age and sexual orientation each 6% ([http://ec.europa.eu/public\\_opinion/archives/eb/ebs\\_168\\_exec.sum\\_en.pdf](http://ec.europa.eu/public_opinion/archives/eb/ebs_168_exec.sum_en.pdf)).

<sup>3</sup> C-342/93 Gillespie and others v Northern Health and Social Services Board, Department of Health and Social Services, Eastern Health and Social Services Board and Southern Health and Social Services Board [1996], C-279/93 Schumacker v Finanzamt Köln-Altstadt [1995].



## Definition of indirect discrimination

The concept of indirect discrimination is one of the most important contributions made by Community law, both in terms of texts and precedents<sup>4</sup>. It provides a unique definition of indirect discrimination that permits concealed discrimination to be detected. The jurisprudence on indirect discrimination in the context of sex equality law is of great assistance<sup>5</sup>. It is usually the rules on indirect discrimination against which most challenges to occupational rules, agreements and practices are examined. Moreover, Art. 2 par. 2 (b) and Art. 3 of the Equality Directives, as well as Art. 3 of the 2002/73/EC Directive cover all working arrangements for all protected grounds, whether they are practices in the workplace, the criteria used to promote or appoint people or to give access to benefits, or the provisions of the contract or other policies, and social protection, social advantages, education and access to goods and services for the protected ground of racial or ethnic origin.

Indirect discrimination is defined in Articles 2 in the Equal Treatment Directives. The preamble of the Recast Directive recalls that "Equality between men and women is a fundamental principle of Community law under Article 2 and Article 3(2) of the Treaty and the case-law of the Court of Justice. Those Treaty provisions proclaim equality between men and women as a 'task' and an 'aim' of the Community and impose a positive obligation to promote it in all its activities" (par. 2).

In addition, the preamble of the Employment Framework Directive (par. 2) states that "the principle of equal treatment between women and men is well established by an important body of Community law". As well as referring to the early development of the concept of discrimination under the Sex Equality Directive (Dir 76/207), the preambles of the Equality Directives (Recitals 2 and par. 4 respectively) and the preamble of Directives 2002/73/EC and 2004/113/EC (Recitals 2 respectively) note that the right of all persons to equality before the law and protection against discrimination constitutes a universal right recognised by the Universal Declaration of Human Rights, The United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms. Directive 2000/43/EC also mentions the International Convention on the Elimination of All Forms of Racial Discrimination and Directive 2000/78/EC recalls that Convention No 111 of the International Labour Organisation prohibits discrimination in the field of employment and occupation.

### ... "on the grounds of" ...

The use of the phrase "...on the grounds of..." in both Directives (Article 1 – Purpose) means that judges will have to consider the causative role that the protected ground played in the treatment of the plaintiff. It is quite unusual to find direct evidence of discrimination – few employers would be prepared to admit such discrimination even to themselves.

<sup>4</sup> A legislative definition of indirect discrimination, which summarizes much of the development in the case-law since the distinction was first drawn by the Court, is included in Article 2(2) of Directive 97/80 on the burden of proof in cases of discrimination based on sex.

<sup>5</sup> C-170/84 *Bilka-Kaufhaus GmbH v Weber vom Hartz* [1986], C-171/88 *Ingrid Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH & Co. KG* [1989], C-196/02 *Nikoloudi v Organismos Tilepikionion Ellados AE* [2005], C-243/95 *Kathleen Hill and Ann Stapleton v the Revenue Commissioners* [1998].

It is important to note that discrimination does not have to be intentional to be unlawful, as a person may discriminate against another unintentionally, or the discrimination frequently could be based on wrong assumptions, such as that the plaintiff would not have fitted in the workplace, or would not be competent to do the essential requirements of a job, or would have caused damages, as a tenant, to the house of the defendant. Consequently, it is essential for the judge considering whether discrimination has taken place to identify the role that the protected ground has played and to adopt a strong approach when reviewing justification put forward by people or employers in particular for indirectly discriminatory behaviour.

Indirect discrimination involves a provision, criterion or practice which is not apparently discriminatory, because it is applied equally to everybody, but which, when the effect or impact of it is assessed, is shown to be particularly disadvantageous for individuals that belong to one or more of the protected groups. Within this broad definition most employment rules, agreements and practices, whether contractual or non-contractual, written or oral, old or new, will be covered - and there are more circumstances in which claims of indirect discrimination can be brought.

This concept is innovative. It allows the possibility to take action during the initial stages of a discriminatory effect, actually to challenge a provision, criterion or practice before it is even applied; and to remedy discriminatory practices or standards in an anticipatory and preventive manner. The provision can be applied even in the absence of evidence that it actually has put any person at a disadvantage. It is sufficient if it would have that effect on prohibited grounds if it was applied.

### **... “at a particular disadvantage” ...**

The inclusion of the phrase “at a particular disadvantage” at the definition of indirect discrimination in Article 2 of the Equal Treatment Directives, shows that it is not necessary to employ statistical evidence/comparison to show that a protected group as a whole is affected disproportionately. Instead, it is necessary to demonstrate that a disadvantage is experienced by individual members of a protected group due to characteristics attributable to such membership. This definition may render it possible to challenge indirect discrimination connected to criteria of employment even where quantitative data regarding its impact upon a protected group is not yet available (e.g. intellectual disability or sexual orientation).

The mere fact that an employer may apply the same (apparently neutral) rule to all staff, does not preclude inequalities remaining. The characteristics of the group to which the individual belongs may result in disadvantage, so that an apparently neutral practice will disadvantage members of the group.



**..."unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."**

If there is a legitimate objective and proportionate means to attain it, the difference in treatment is justified where there is indirect discrimination.

This is an exemption to the prohibition of indirect discrimination enacted by the Equal Treatment Directives. According to the law, if a provision, criterion, or practice is justified by a legitimate objective (which, by definition, excludes any form of intentional discrimination) and the means used to achieve it are appropriate and necessary, then indirect discrimination is not unlawful.

For example, an employer may be able to demonstrate convincingly that his/her objectives are justified, and that the means chosen to achieve them are appropriate and necessary; the employer needs, though, to provide real evidence to support any claim of objective justification. If so, a claim based on indirect discrimination may not succeed. Whether the claim fails will depend upon the methods chosen by the employer which should correspond to "a genuine need of the company". Further, the methods chosen must be proportionate for achieving the legitimate aim in question; according to this, the discriminatory effect is significantly outweighed by the importance and benefits of the legitimate aim and the employer has no other alternative to the action s/he is taking.

*Questions:*

- *If an employer demands a written job application or sets a written test for a job where literacy skills are not particularly necessary, does this constitute indirect discrimination against people with intellectual disabilities who perhaps are illiterate?*
- *If an employer refuses to provide facilities to carers for flexible working hours, does this amount to indirect sex discrimination?*
- *If marriage or same-sex partnership is not legally recognised in your country, or, in case it is, same-sex partners are not placed in the same position as partners of different sex, do you think that this might constitute indirect discrimination in terms of social benefits? <sup>6</sup>*
- *Can differences based on nationality or languages constitute indirect discrimination? If so, are there any examples of this in your countries?*

<sup>6</sup> C-267/06 Tadao Maruko v Versorgungsanstalt der deutschen Bühnen [2008].