

JUSTIFICATION FOR INDIRECT DISCRIMINATION IN EU

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Abstract

The right to non-discrimination is very important for a civilized society. EU legislation establishes direct and indirect discrimination, harassment, sexual harassment, instruction to discriminate and any less favourable treatment of a woman related to pregnancy or maternity leave as forms of discrimination. The law and the Court of Justice permit the justification of indirect discrimination.

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JEL Classification: *K31, K33. K42*

1. Equality as a fundamental right in EU

The right to equality and to non-discrimination is important for a civilized society. Right of all persons to equality before the law and protection against discrimination constitute a universal right recognized by the Universal Declaration of Human Rights, by the United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights respectively on Economic, Social and Cultural Rights and the European Convention on Human Rights and Fundamental Freedoms. The principle of equality between men and women is now one of the cornerstones of European law.

The Court of Justice of the European Union recognised equality between men and women as a fundamental constitutional principle of European law:

“...respect for fundamental personal human rights is one of the general principles of the Community law... There can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights”².

Thus, the Court determined that equal treatment between women and men is a fundamental human right but also a general principle of EU law.

Moreover, equality between women and men is considered a fundamental principle by recent legislation.³ The Charter of Fundamental Rights contains a prohibition of discrimination on various grounds. The Charter makes a distinction between the prohibition of discrimination on grounds of sex provided in Article 21 and the gender equality provided in Article 23.

The Treaty on European Union states that “the principle of equality between women and men is one of the values of the Union”⁴ and “promoting gender equality is an objective of the EU”⁵. Moreover, The Lisbon Treaty provides the EU to join the European Convention on Human Right as part of its own, and the Convention, as amended by Protocol 14, allows this.

2. Discrimination-general meaning

In Aristotle’s definition, equality means that like are treated alike and unlike are to be treated differently.

The Advocate General in his opinion on case 422/02⁶ observed that “ ‘equal treatment’ and ‘non-discrimination’ are simply two labels for a single Community law principle” which prohibits

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² Judgement of 15 June 1978, Defrenne v SABENA (C-149/77, ECR 1978 p. 1365), para. 26, 27

³ Preamble 4 of Directive 2002/73/EC amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions

⁴ Article 2 of Treaty on European Union

⁵ Article 3 paragraph 3 of Treaty on European Union

⁶ Opinion of Advocate General in case C-422/02 P, para. 36

both treating similar situations differently and treating different situations in the same way unless there are objective reasons for such treatment.

Under CJEU case law “discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations”.⁷ The principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.⁸

Currently the EU legislation establishes both form of discrimination: direct and indirect discrimination.

The article 2(1) of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation states that the principle of equal treatment:

“...shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds ...”

Within the meaning of article 2(1) of Directive 2000/78/EC in the concept of discrimination there are included harassment and instruction to discriminate.

Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)⁹ includes in the concept of discrimination on grounds of sex: harassment, sexual harassment, instruction to discriminate and any less favourable treatment of a woman related to pregnancy or maternity leave.

In accordance with Article 2(1)(a) of Directive 2006/54 direct discrimination is:

“...where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation.”

The definition of indirect discrimination is in Article 2(1)(b) of Directive 2006/54:

“...an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.”

Harassment is defined in Article 2(1)(c) as an:

“...unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.”

Article 2(1)(d) gives the definition of sexual harassment:

“...any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.”

Instruction to discriminate against persons on grounds of sex does not have a legal definition.

3. Indirect discrimination in European law

Originally there was only one form of discrimination. At the beginning discrimination was unequal treatment of comparable situation explicitly based on a prohibited criterion. Subsequently, the Court distinguished between direct and indirect discrimination. The EU Directives also made a distinction between direct and indirect discrimination, but without defining either of them.

⁷Judgment of 14 February 1995, Finanzamt Köln-Altstadt v Schumacker (C-279/93, ECR 1995 p. I-225), para. 30

⁸ For example Judgment of 13 December 1984, Sermide (106/83, ECR 1984 p. 4209), para. 28, or Judgment of 15 April 2008, Nuova Agricast (C-390/06, ECR 2008 p. I-2577), para. 66

⁹ Article 2(2) of Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)

As states and employers become more aware of the penalties for unlawful discrimination, overt prejudice migrates into more covert forms of discrimination, referred to as indirect discrimination.¹⁰

The problem of existence a form of discrimination other than direct was raised, for the first time, in cases relating to discrimination on grounds of nationality. In *Milchverwertung-Südmilch AG v Salvatore Ugliola* case¹¹ the Court refers, for the first time, to indirect discrimination.

In *Giovanni Maria Sotgiu v Deutsche Bundespost* case¹² the CJUE state that the rules regarding equality of treatment forbid not only overt discrimination but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.

The Court considers necessary to establish a distinction (within the overall scope of Article 119), between, on the one hand direct and overt discrimination which may be identified solely with the aid of the criteria based on equal work and equal pay referred to by the article in question and, secondly, indirect and disguised discrimination which can only be identified by reference to more explicit implementing provisions of a Community or national character.¹³

In his opinion¹⁴ in case *Bilka-Kaufhaus GmbH v. Weber von Hartz* the Advocate General notice that the paragraph 17 of the decision in *Jenkins*¹⁵ "...seems to add a distinction between discrimination which may be judicially identified without further assistance and discrimination which can be identified only by reference to more precise criteria laid down by Community or national law."

The Court strictly divided the discrimination notion into direct and indirect discrimination. In CJEU case-law direct discrimination exist when the provision, criterion or practice explicitly refers to sex as the ground of discrimination. Indirect discrimination, on the other hand, occurs when a disadvantageous provision, criterion or practice is unrelated to sex.

Formed by means of jurisprudence indirect discrimination was subsequently recognized in the legislation. Directive 97/80 on the burden of proof in cases about sex discrimination was the first EU legal instrument that gives a legal definition of indirect discrimination. According to article 2(2):

"... indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex. "

Directive 2006/54/EC repealed Directive 97/80. Directive 2006/54/EC in article 2(1)(b) give a definition of indirect discrimination:

"...an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary. "

According to the definition presented above, to exist an indirect discrimination some criteria must be met:

- a) The existence of a neutral provision, criterion or practice that does not obviously rely on a protected ground;
- b) The provision, criterion or practice causes a disadvantage for the protected group;
- c) The provision, criterion or practice should not objectively justified by a legitimate aim that does not rely to the protected ground;

¹⁰ Mark Bell, *Sexual Orientation Discrimination in Employment: An Evolving Role for the European Union* In Robert Wintemute, Mads Andenæs (eds.) *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law*, Hart Publishing, Oxford, 2001, p. 659

¹¹ Judgment of 15 October 1969, *Württembergische Milchverwertung Südmilch AG v Ugliola* (15/69, ECR 1969 p. 363), para. 6

¹² Judgment of 12 February 1974, *Sotgiu v Deutsche Bundespost* (152/73, ECR 1974 p. 153), para. 11

¹³ Judgment of 8 April 1976, *Defrenne v SABENA* (43/75, ECR 1976 p. 455), para. 18

¹⁴ Opinion of Advocate General in case C-170/84, para. 11

¹⁵ Judgment of 31 March 1981, *Jenkins v Kingsgate* (96/80, ECR 1981 p. 911)

- d) The provision, criterion or practice is appropriate in that situation;
- e) The provision, criterion or practice is necessary in that situation.

In the case of indirect discrimination difference in treatment is apparently neutral, and not obviously as in the case of direct discrimination. Different treatment is not, at first sight, forbidden by law, but in reality practice disadvantages a particular group.

Discrimination is indirect if it occurs on grounds other than sex and appear to be objective and acceptable but in fact results different treatment for one sex.

4. Justify indirect discrimination

In order to establish if a provision, criterion or practice is discriminatory two stages must be completed. First, the plaintiff should present the facts that lead to the presumption of the existence of discrimination. After that, the judge examine whether the respondent can objectively justify the provision, criterion or practice in question. If the respondent succeeds to justify his decisions there is no unlawful discrimination.

The law recognise that differences of treatment on different grounds can sometimes be justified. If in the case of direct discrimination the possibility to justify is limited to the cases presented in the law, in the case of indirect discrimination the possibility to justify is not limited. Objective justification is a notion that is related only to the indirect discrimination.

So, an apparently neutral provision, criterion or practice that has a disadvantageous effect is not considered indirect discrimination if it is objectively justified.

In the Court case-law the notions used is different. In case *Bilka-Kaufhaus GmbH v. Weber von Hartz*:¹⁶

“... if the undertaking is able to show that its pay practice may be explained by objectively justified factors unrelated to any discrimination on grounds of sex there is no breach of article 119.”

a. A legitimate aim

Objective justification requires first of all a legitimate aim. This concept has an open nature and is not limited to a closed list of grounds.¹⁷

However, although in preliminary ruling proceedings it is for the national court to establish whether such objective reasons exist in the particular case before it, the Court of Justice, which is called on to provide answers of use to the national court, may provide guidance based on the documents in the file and on the written and, as the case may be, oral observations which have been submitted to it, in order to enable the national court to give judgment.¹⁸

The Court held that a measure could be objectively justified if they correspond to a real need on the part of the undertaking.¹⁹ The difference of treatment could be justified by factors unrelated to any discrimination on grounds of sex.²⁰ So, first, the measures should correspond to a real need for the employer, and then the measures should not be related to sex.

Economic justification is possible. In *J.P. Jenkins v Kingsgate (Clothing Productions) Ltd.*²¹ the Court states that the objective justification concept include economic consideration.

¹⁶ Judgment of 13 May 1986, *Bilka v Weber von Hartz* (170/84, ECR 1986 p. 1607) , para.30

¹⁷ Christina Tobler, *Limits and protection of the concept of indirect discrimination*, European Commission, 2008, p.32

¹⁸ Judgment of 30 March 1993, *Secretary of State for Social Security v Thomas and others* (C-328/91, ECR 1993 p. I-1247), para. 13, Judgment of 7 March 1996, *Freers and Speckmann* (C-278/93, ECR 1996 p. I-1165), para. 24, Judgment of 9 February 1999, *Seymour-Smith and Perez* (C-167/97, ECR 1999 p. I-623), para. 68, Judgment of 11 September 2003, *Steinicke* (C-77/02, ECR 2003 p. I-9027), para. 59, Judgment of 10 March 2005, *Nikoloudi* (C-196/02, ECR 2005 p. I-1789) , para. 49

¹⁹ Judgment of 13 May 1986, *Bilka v Weber von Hartz* (170/84, ECR 1986 p. 1607) , para.30

²⁰ Judgment of 13 July 1989, *Rinner-Kühn v FWW Spezial-Gebäudereinigung* (171/88, ECR 1989 p. 2743) , para. 12, Judgment of 11 September 2003, *Steinicke* (C-77/02, ECR 2003 p. I-9027), para. 57, Judgment of 10 March 2005, *Nikoloudi* (C-196/02, ECR 2005 p. I-1789), para. 47

²¹ Judgment of 31 March 1981, *Jenkins v Kingsgate* (96/80, ECR 1981 p. 911), para. 12

The Court ruled that professional training is not merely one of the factors that may be an objective justification forgiving different pay for doing the same work.²²

In the case of national legislation of a Member State in the social field the Court held that the contested rule must reflect a legitimate aim of the Member State's social policy that is not related to any discrimination on grounds of sex.²³ A simple statement of a general nature is insufficient evidence that the aim of the measures in question has nothing to do with sex discrimination. The encouragement of recruitment constitutes a legitimate aim of social policy.²⁴

Although budgetary factors may underlie the Member State's choice of social policy and influence the nature or extent of the social protection measures it wishes to adopt, they do not in themselves constitute an aim of that policy and hence cannot be submitted as a justification for discriminating against one of the sexes.²⁵ Moreover, to concede that budgetary considerations may justify a difference in treatment between men and women which would otherwise constitute indirect discrimination on grounds of sex would mean that the application and scope of a rule of EU law as fundamental as that of equal treatment between men and women might vary in time and place according to the state of the public finances of Member States.²⁶

The Court will not accept an objective reason if it is no more than a mere generalisation insufficient to show that the aim of the measures at issue is indeed unrelated to any discrimination.²⁷

In social policy Member States have a broad discretion. A social or an employment policy can be a legitimate aim in accordance with Member States social policy. An employer cannot rely on aims of social or employment policy.²⁸

The national court has sole jurisdiction to determine, in each individual case, whether and to what extent the grounds put forward by an employer to explain the discriminatory may be regarded as objectively justified economic grounds.²⁹ The national court should decide regard being had to the facts of the case, its history and the employer's intention.³⁰

In its case-law the Court of Justice accepted some measures taken by employers or by Member States as legitimate.

For example, in case *Jenkins v Kingsgate* economic factors relating to the needs and objectives of the undertaking are legitimate. If the employer pays full-timers more than part-timers in order to encourage full-time work (like in case C-170/84 *Bilka v Weber von Hartz*), or pays certain jobs more in order to attract candidates when the market indicates that such workers are in short supply (for example in Case 127/92 *Enderby*), pays job-sharers less solely on the ground that avoidance of such discrimination would involve increased costs (as in case C-243/95 *Hill*) the discriminatory conduct may be justified on grounds other than sex. If an employer makes generalizations about certain categories of workers such as the belief that part-time workers are not as integrated in, or as dependent upon, the undertaking employing them as full-time workers (like in case C-171/88 *Rinner-Kühn*), or wants to encourage mobility and training (case C-109/88 *Danfoss*) those measures can be justified.

The Court found that some measures taken by the Member States can be justified. For instance the aim to encourage employment and recruitment (case C-77/02 *Steinicke*), to alleviate the constraints burdening small businesses (case 189/91, *Kirsammer-Hack*), to respond to the demand for minor employment and to fight unlawful employment (case C-444/93 *Megner*), to

²² Judgment of 17 October 1989, *Handels- og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening*, acting on behalf of *Danfoss* (109/88, ECR 1989 p. 3199), para. 23, Judgment of 11 May 1999, *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse* (C-309/97, ECR 1999 p. I-2865), para 19

²³ Judgment of 9 February 1999, *Seymour-Smith and Perez* (C-167/97, ECR 1999 p. I-623), para.76

²⁴ *Id.* para. 71

²⁵ Judgment of 24 February 1994, *Roks and others v Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen and others* (C-343/92, ECR 1994 p. I-571), para. 35, Judgment of 11 September 2003, *Steinicke* (C-77/02, ECR 2003 p. I-9027), para. 66, Judgment of 10 March 2005, *Nikoloudi* (C-196/02, ECR 2005 p. I-1789), para. 53

²⁶ Judgment of 6 April 2000, *Jørgensen* (C-226/98, ECR 2000 p. I-2447), para. 39, Judgment of 7 June 2007, *van der Weerd and others* (C-222/05 to C-225/05, ECR 2007 p. I-4233), para. 36

²⁷ Judgment of 10 March 2005, *Nikoloudi* (C-196/02, ECR 2005 p. I-1789), para 52

²⁸ Judgment of 9 September 1999, *Krüger* (C-281/97, ECR 1999 p. I-5127), para. 29

²⁹ Judgment of 13 May 1986, *Bilka v Weber von Hartz* (C-170/84, ECR 1986 p. 1607), para.30

³⁰ Judgment of 31 March 1981, *Jenkins v Kingsgate* (C-96/80, ECR 1981 p. 911), para. 14

guarantee a minimum replacement income (case C229/89 Commission v Belgium), or the aim of the EC legislator to legislate on specific training for general medical practitioners in order to prepare them better to fulfil their particular function (case C-25/02 Rinke) are legitimate aims according to the Court judgement.

b. Appropriate and necessary measure

The next stage in determining if a provision, criterion or practice that causes a disadvantage for the protected group does not infringe legal provisions on indirect discrimination is to determine if that provision, criterion or practice chosen by an employer or by Member States is appropriate and necessary in that situation.

In Mangold case³¹ the Court states that observance 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 EU Directives leaves broad discretion to Member States and to employer in determining an appropriate measure suitable for achieving the aim.

In matter of proportionality mere generalisation is not sufficient. Generalisations concerning the capacity of a specific measure to encourage recruitment are not enough to show that the aim of the disputed rule is unrelated to any discrimination based on sex nor to provide evidence on the basis of which it could reasonably be considered that the means chosen were suitable for achieving that aim.³² Determining if a provision, criterion or practice is suitable for achieving the aim is made in each case.

It is for the national court to determine, in light of all the relevant factors and taking into account the possibility of achieving by other means the aims pursued by the provisions in question, whether those aims appear to be unrelated to any discrimination on grounds of sex and whether those provisions, as a means to the achievement of certain aims, are capable of advancing those aims.³³

If a Member State is able to show that the measures chosen reflect a necessary aim of its social policy and are suitable and necessary for achieving that aim, the mere fact that the legislative provision affects far more women than men at work cannot be regarded as a breach of Article 119 of the Treaty.³⁴

In order to determine whether the differential treatment is proportionate, the Court must verify if there is no other means of achieving that aim that imposes less of an interference with the right to equal treatment.³⁵ In other words, the disadvantage suffered must be the minimum possible level of harm needed to achieve the aim sought.

5. Conclusions

Due to its apparently neutral nature indirect discrimination can take various forms unlike direct discrimination which implies the existence of a less favourable treatment on grounds of sex. According to the wording used by the EU Directives there is a possibility of justifying differential treatment, which will prevent finding discrimination in that case.

³¹ Judgment of 22 November 2005, Mangold (C-144/04, ECR 2005 p. I-9981), para. 65

³² Judgment of 9 February 1999, Seymour-Smith and Perez (C-167/97, ECR 1999 p. I-623), para.76

³³ Judgment of 13 July 1989, Rinner-Kühn v FWW Spezial-Gebäudereinigung (171/88, ECR 1989 p. 2743) , para. 15, Judgment of 11 September 2003, Steinicke (C-77/02, ECR 2003 p. I-9027), para. 58, Judgment of 10 March 2005, Nikoloudi (C-196/02, ECR 2005 p. I-1789), para. 48

³⁴ Judgment of 13 July 1989, Rinner-Kühn v FWW Spezial-Gebäudereinigung (171/88, ECR 1989 p. 2743) , para. 13, Judgment of 7 May 1991, Commission v Belgium (C-229/89, ECR 1991 p. I-2205) , para. 19, Judgment of 14 December 1995, Megner and Scheffel v Innungskrankenkasse Vorderpfalz (C-444/93, ECR 1995 p. I-4741), para. 24, Judgment of 7 March 1996, Freers and Speckmann (C-278/93, ECR 1996 p. I-1165), para. 28, Judgment of 9 February 1999, Seymour-Smith and Perez (C-167/97, ECR 1999 p. I-623), para.69

³⁵ Elana Moran, *Justifying direct discrimination: an analysis of the scope for a general justification defence in cases of direct sex discrimination*. Doctoral thesis, University of London, 2000, p. 127

In order to justify differential treatment, it must be shown that provision, criterion or practice pursues a legitimate aim and that the means chosen to achieve that aim is appropriate and necessary in that situation. Moreover, the court must verify if there is no other means of achieving that aim that imposes less of an interference with the right to equal treatment. That stages of the justification can be considerable hurdle for employers.

The benefits of a successful claim of indirect discrimination³⁶ made by an individual would apply to all persons sharing the same protected characteristics and, therefore, to the group as a whole.³⁷

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³⁶ The benefits of a successful claim of indirect discrimination is the removal of the provisions, criteria or practices.

³⁷ Richard Whittle, *The Framework Directive for equal treatment in employment and occupation: an analysis from a disability perspective*, „European Law Review”, volume 27, issue 3, 2002, p.311

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