Direct and Indirect Discrimination in European Union Law – How to Draw a Dividing Line?*

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The article focuses on the concepts of direct and indirect discrimination and tries to identify their specific features. Both forms are defined in the secondary law of the European Union. According to these regulations direct discrimination occurs where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on the basis of any of the prohibited grounds such as sex, racial or ethnic origin, religion, disability, age or sexual orientation. Indirect discrimination takes place where an apparently neutral provision, criterion or practice would put persons protected by the general prohibition of discrimination 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. As a result in the first part of the study the main differences between direct and indirect discrimination are presented. The second part concentrates on the role of the ground in drawing a dividing line between both forms of discrimination. It should be noticed that direct discrimination is based on the forbidden ground e.g. nationality or sex while indirect discrimination refers to neutral criteria whose application puts members of a particular group in a disadvantageous position in relation to other people. Consequently, it is important to state to what result the application of particular provisions or practices leads. Therefore, the third part of the study deals with the analysis of the result of a measure as a factor important for distinguishing direct and indirect discrimination. Finally, the former one can be justified only in situations predicted in the legal provisions, while the latter with reference to a legitimate aim. However, it should be proved that the applied measures are appropriate and necessary in other words proportional. These questions are presented in the fourth part of the study.

Keywords: equality principle, direct discrimination, indirect discrimination, objective justification, legitimate aim, proportionality

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1. Introduction

Discrimination as a legal concept is difficult to define but there is a common agreement that this term is not equivalent to the distinction as such, but refers to the disadvantageous treatment of an individual based on a ground prohibited by law (M. Miné 2003: 30). Within the sphere of the European Union (EU) law, discrimination is connected with comparability and generally occurs when comparable situations are treated differently and different situations treated in the same way, unless such treatment is objectively justified (see eg. Case 106/83 Sermide [1984] ECR 4209). However, the EU anti-discrimination law contains definitions of different forms of discrimination which raises questions about their relations.

The distinction between direct and indirect discrimination is important not only from theoretical but also a practical point of view. From the perspective of the victim of the alleged discrimination, a finding of its direct form will always be preferable because of the usually more limited justification possibilities and because of the difficulties involved in proving disparate impact which is required in the case of indirect discrimination (Ch. Tobler 2005: 307). At the same time both forms of discrimination are complementary in the sense that if one cannot prove direct discrimination e.g. due to incomparability of the situation, at least in some cases it is possible to allege an indirect form of disadvantageous treatment. Therefore, it is important to define the main differences between these two concepts This problem is presented in the first part of the study.

The analysis is based on the regulations of the EU anti-discrimination law as well as on the case-law of the Court of Justice. It shows that although on the conceptual level direct and indirect discrimination differ from each other mainly in relation to the ground on which they are based as well as to the scope of justification, in practice the dividing line is not always so clear (J. Maliszewska-Nienartowicz 2012: 23). Consequently, the following sections of the study concentrate not only on these two elements but also on the effect of the measure.

2. The main differences between direct and indirect discrimination

According to the provisions of the Equality Directives[1] direct discrimination occurs where one person is treated less favourably on grounds of prohibited criterion (racial or ethnic origin, religion or belief, disability, age, sexual orientation or sex) than another is, has been or would be treated in a comparable situation. Thus, it relates to the disadvantageous treatment based on the possession of specific characteristics which distinguish an individual from other people. It is therefore necessary to determine a comparator e.g. a male worker, and a compared situation, which may be either past, present, or even hypothetical (see A. Masselot 2004: 96). The causation of the less favourable treatment and comparability of situations play an important role in the context of direct discrimination. This is confirmed in the definitions predicted in the Equality Directives. The motivation for the application of a directly discriminatory measure seems to be less important. The case-law of the Court of Justice confirms that it is not necessary to prove that it has had an intentional character.

[1] These directives include: Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19 July 2000, 22-26; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2 December 2000, 16-22; 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 L 373, 21 December 2004, 37-43 and Council Directive 2006/54/EC 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, OJ L 204, 26 July 2006, 23-36.

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Consequently, in the context of direct discrimination the link with the ground on which it is based is strong both in form and in substance. Regarding the form, the link is straightforward inasmuch as the prohibited ground is explicitly and obviously relied on (Ch. Tobler 2008: 48). It is also important to note that the effect of a directly discriminatory measure covers the whole group of people, such as women, people of different sexual orientation, disabilities etc. - all of them are at a disadvantage which confirms strong substantial connection with the prohibited ground.

In contrast indirect discrimination is based on neutral criteria which formally are not prohibited. According to the Equality Directives indirect discrimination occurs where an apparently neutral provision, criterion or practice would put persons protected by the general prohibition of discrimination (that is persons of one sex, racial or ethnic origin, religion or belief, disability, age or 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. The effect of such a measure is similar to direct discrimination – an individual who belongs to the protected group is disadvantaged (I. Boruta 2004: 38).

Thus, in the context of direct discrimination a causation is a decisive element, whereas indirect discrimination is an effect-related concept. Therefore, it is an useful tool in combating covert forms of discrimination. However, it cannot be limited to them as sometimes indirect discrimination has an overt character (E. Ellis 2005: 89). It should also be underlined that in order to establish indirect discrimination a complainant has to identify a group of persons in order to make a comparison, not an individual (E Ellis 2005: 95).

As far as the link with the discrimination criterion is concerned it can be noticed that it is weaker both in form and in substance. "On the level of form, there is a reliance on an apparently neutral criterion. On the level of substance, it is characteristic for indirect discrimination that the division between the groups that are differently affected (i.e. those disadvantaged by the measure in question) is not quite the same as in the case of direct discrimination. Typically, the group of the disadvantaged is consisting not exclusively, but only disproportionately of persons that are protected by the discrimination ground in question" (Ch. Tobler, K. Waaldijk 2009: 737). This issue will be further discussed in the fourth section of the article.

Regarding the scope of justification, both the EU regulations and the case-law of the Court of Justice show that the list of exceptions to the prohibition of direct discrimination is a closed one and it has to be predicted in the binding law. However, it is not the same in relation to all the criteria of discrimination. For instance, direct discrimination based on sex can be justified by "a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate" (article 14 (2) of Directive 2006/54). Similar provisions are included in Article 4 of Directive 2000/43 and Article 4 (1) of Directive 2000/78). They both predict that Member States may provide that a difference of treatment which is based on a characteristic related either to racial or ethnic origin or to religion, belief, disability, age and sexual discrimination:

shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

However, Directive 2000/78 provides also for other exceptions to the prohibition of discrimination based on religion or belief, disability, age or sexual discrimination. Article 2 (5) predicts that it is possible to apply such measures:

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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.

This exception is quite general and as such is criticised in the literature. In fact, one can speculate why it was necessary in a measure addressing discrimination on the grounds of religion or belief, disability, age and sexual discrimination while similar provision was not included in any of the other Equality Directives (M. Bell, L. Waddington 2001: 598).

Moreover, Directive 2000/78 provides for a special exception to the prohibition of discrimination on grounds of religion or belief. Art. 4 (2) allows the Member States:

to maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment (…) should not justify discrimination on another ground.

The next Article 3 (4) of Directive 2000/78 relates to disability and age. It allows the Member States to provide that the provisions prohibiting discrimination on the basis of these two criteria do not apply to the armed forces. Finally, Directive contains a detailed regulation concerning exceptions to the prohibition of discrimination based on age. Article 6 (1) of Directive 2000/78 provides that Member States may justify different treatment on grounds of age “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”. This provision differs from the others since it predicts an open-ended possibility for Member States to justify direct age discrimination. As a result of the hierarchy among particular grounds race discrimination seems to be at its peak and age discrimination at the bottom since it can be broadly justified (M. Bell, L. Waddington 2001: 599 and 610).

There is no doubt that such a broad scope of justification for direct age discrimination blurs the distinction between direct and indirect discrimination. Still, the latter can be justified with reference to a wider list of legitimate aims which are not even mentioned in the provisions of the Equality Directives. On the contrary, the possible justifications for indirect discrimination are framed in very general terms (objectively justified by a legitimate aim). According to the case-law of the Court of Justice this concept allows to take into account any of potentially acceptable, legitimate aims which are not related to a discrimination ground. Moreover, they cannot have a purely economic nature (e.g. budgetary considerations in relation to the Member States activities) and the measures undertaken to achieve them should be proportional. The list of such legitimate aims is not predicted in the Equality Directives and has an open character. The Court of Justice has acknowledged that such status have e.g.:

- ensuring coherence of the tax system;
- the safety of navigation, national transport policy and environmental protection in the transport sector;
- protection of ethnic and cultural minorities living in particular region;
- ensuring sound management of public expenditure on specialised medical care;
- encouragement of employment and recruitment by the Member States;
- guaranteeing a minimum replacement income;

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- the need to respond to the demand for minor employment and to fight unlawful employment (see further J. Maliszewska-Nienartowicz 2012: 307, 310-311 and Ch. Tobler 2008: 34).

3. Ground of discrimination - a decisive factor for distinguishing direct and indirect discrimination?

As it was mentioned above, the ground of discrimination plays an important role in determining whether it is direct or indirect. The identification of the correct criterion on which the distinction is made should be one of the first steps taken by the court in discrimination cases. Sometimes it can be a difficult task and it also happens that one ground is treated as a basis of either direct or indirect discrimination. This is confirmed in the case-law of the Court of Justice concerning nationality discrimination. In some cases residence has been treated by the Advocates General as a ground leading to indirect nationality discrimination and the Court of Justice has held that if the residence requirement is imposed exclusively on nationals of other Member States, then discrimination is clearly (in other words directly) based on nationality[2].

When analysing the facts, the court should also identify whose treatment is at issue. In some cases there may be more than just one possible approach and then the choice should be made in the interests of the plaintiff (Ch. Tobler 2005: 341). For instance, in the case Schmid (C-310/91 [1993] ECR I-3011) the plaintiff represented his daughter, demanding to grant her disability allowance which was denied because of her German citizenship. Therefore, the assessment of the Belgian regulations depended on whom the Court of Justice would focus its analysis: on the daughter or the claimant, who was also a German citizen. In the first case, there would be direct discrimination on grounds of nationality, while in the second indirect discrimination. The Court of Justice concentrated on the situation of the plaintiff and consequently, concluded that:

any provision such as that in Belgian law making entitlement to that social advantage conditional upon nationality is incompatible with Article 7, even if it also applies to the offspring of national workers. It is sufficient to point out that the condition of possessing the nationality of the country of residence would be more easily fulfilled by the offspring of national workers than by the offspring of migrant workers (§ 24 and 25).

Thus, the Belgian regulation was treated as indirectly discriminatory and the Court of Justice did not analyse if it could be justified. In this case it extended the protection of the migrant workers to their children which was generally advantageous for them despite the possibility of justification connected with indirect discrimination.

Another approach was taken in the case Lindman (C-42/02 [2003] ECR I-13519). Although the plaintiff claimed her unequal treatment as a recipient of services, the Court of Justice focused on the analysis of the situation of service providers offering different types of lotteries. As a result, it found that foreign service providers were treated differently for tax purposes - only winnings from games of chance which were not licensed in Finland were regarded as taxable income, whereas winnings from games of chance organised in that Member State were not taxable income. Therefore, foreign service providers were at a disadvantage compared to their domestic counterparts. The Court of Justice came to conclusion that the Finish legislation had a manifestly discriminatory character (§ 22) which meant that it resulted in direct discrimination on grounds of nationality. Thus it can be seen that the analysis of the facts of the case may sometimes lead to different conclusions about the nature of discrimination. As indicated above, it is important to take into account the interests of the

[2] See e.g. case 249/83 Vera Hoeckx v. Openbaar Centrum voor Maatschappelijk Welzijn, Kalmthout [1985] ECR 973 where the Court underlined: “the residence requirement is an additional condition imposed on workers who are nationals of a Member State but not national workers. It therefore constitutes a clear case of discrimination on the basis of the nationality of workers (§ 24)”.

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plaintiffs. It seems, therefore, that if it is possible to interpret the facts of the case in a different way, the courts should try to establish direct discrimination as it may not be justified as widely as indirect discrimination.

The analysis of the facts of the case should be followed by the analysis of the potentially relevant law (Ch. Tobler 2005: 338). However, a particular ground can be included in the list of prohibited grounds in some provisions and not explicitly taken into account in others, which may be important in determining whether it leads to direct or indirect discrimination. For instance, the requirement of residence may, depending on the area where it is applicable, lead to direct or indirect discrimination. The former situation takes place in relation to the freedom of establishment for companies and the latter in the field of the free movement of workers and services. Similarly, reference to the marital or family status can have different legal consequences - if it is regulated in the relevant provisions as a separate ground then discrimination based on it has a direct character. However, usually this criterion is not taken into account in the legal provisions. As a result the Court of Justice takes the position that it leads to indirect discrimination on grounds of sex (see e.g. the case Teuling, 30/85 [1987] ECR 2497).

Moreover, it should be noticed that according to its case-law direct discrimination may occur also where criterion which appears to be neutral is in reality inextricably linked to the ground prohibited in the European Union law. The best example in this regard is pregnancy discrimination which is generally considered by the Court of Justice as direct discrimination. In the case Dekker (C-177/88 [1990] ECR I-3941) it found that “only women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex”. It also underlined that:

the reply to the question whether the refusal to employ a woman constitutes direct or indirect discrimination depends on the reason for that refusal. If that reason is to be found in the fact that the person concerned is pregnant, then the decision is directly linked to the sex of the candidate. In those circumstances the absence of male candidates cannot affect the answer to the first question (§ 17).

This position is generally accepted in the doctrine and seen as advantageous for pregnant women – direct discrimination cannot be justified in such a broad way as indirect one. It is even underlined that in this way the Court takes into account the remedial function of the anti-discrimination law (e.g. Ellis 1994: 568). However, some authors notice that treating pregnancy discrimination as direct sex discrimination in all cases makes some of the Court’s decisions difficult to explain (R. Wintemute 1998: 29).

Indeed, the Court in the case Hertz (C-179/88 [1990] ECR I-3979) decided on the same day as Dekker found that:

In the case of an illness manifesting itself after the maternity leave, there is no reason to distinguish an illness attributable to pregnancy or confinement from any other illness (…) Male and female workers are equally exposed to illness. Although certain disorders are, it is true, specific to one or other sex, the only question is whether a woman is dismissed on account of absence due to illness in the same circumstances as a man; if that is the case, then there is no direct discrimination on grounds of sex (§ 16 and 17).

This shows that the Court is not willing to treat all disadvantageous treatment related to pregnancy and maternity as direct sex discrimination. Only during the pregnancy and the statutory pregnancy or maternity leave it is granted legal recognition as discrimination on grounds of pregnancy and thereby directly on sex. Thereafter, it is considered to be based on illness and as such could amount

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to no more than indirect sex discrimination if it can be shown that considerably more women than men suffer from such long-term ‘illness’ (Ch. Tobler 2005: 347 and 348)

On the whole it can be seen that the case-law on pregnancy discrimination is not completely consistent. Consequently, some commentators suggest to treat discrimination on grounds of pregnancy and maternity as indirect sex discrimination (see further R. Wintemute 1998: 30-36). However, such a position is not generally seen as correct in particular because of the possibility of broader justification than is the context of direct sex discrimination. It seems that this was one of the main reason why the Court of Justice decided to treat pregnancy discrimination as direct sex discrimination. Therefore, it will not be willing to change its position in this regard. The Court could, however, consider if in cases concerning unfavorable treatment after the statutory pregnancy or maternity leave there was at least indirect discrimination on grounds of sex (J. Maliszewska-Nienartowicz 2012: 350).

Generally, the case-law on pregnancy discrimination shows that a differential treatment based on a criterion which is inextricably linked to the ground prohibited in the legal provisions leads to direct discrimination. The same approach was taken by Advocate General Juliane Kokott and the Court of Justice in the case Ole Andersen (C-499/08 [2010] ECR I-9343) that concerned age discrimination. Advocate General noticed that:

a direct difference in treatment based on age must be assumed to exist not only where one person is treated less favourably than another is, has been or would be treated in a comparable situation expressly on grounds of age, but also where such treatment is afforded to that person on the basis of a criterion which is inextricably linked to – absolute or relative – age (§ 36).

The Court of Justice agreed with her opinion and underlined that national provision which deprives certain workers of their right to the severance allowance on the sole ground that they are entitled to draw an old-age pension from their employer under a pension scheme, which they joined before attaining the age of 50 years, is based on a criterion inextricably linked to the age of employees. Consequently, it leads to direct discrimination based on age.

Thus, it can be seen that in certain situations even though the ground seems to be neutral at first sight, it may lead to direct discrimination. However, it should be proved that such a criterion has a specific character in that sense that it is naturally linked to another ground explicitly prohibited by the EU law. The Court of Justice has referred in its case-law to sex and age in this context but there is no doubt that the same conclusion can also be made in relation to other grounds e.g. religion or disability.

4. The effect of the measure and its role in drawing a dividing line between both forms of discrimination

As it was mentioned above, a directly discriminatory measure has such an effect that the whole group of people, e.g. women, people of different sexual orientation or the disabled are at a disadvantage. In the case of indirect discrimination the effect is not so far-reaching in the sense that not all, but a disproportionately greater number of persons protected is at a disadvantage which, however, does not mean that this group does not contain unprotected person, e.g. men in the group of part-time employers which consists mainly of women. Such conclusions can be drawn from the recent case-law of the Court of Justice, as initially it put the emphasis on the formal aspect - any measure that did not formally rely on a prohibited criterion would be assessed in the context of the framework of indirect discrimination, even if its effect was practically the same as in the case of direct discrimination (Ch. Tobler 2008: 49).

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The best example of such a formal approach is the case Schnorbus (C-79/99 [2000] ECR I-10997). It concerned rules on access to practical legal training in Land Hesse which provided that if the number of applicants exceeded the number of training places, an applicant who had completed military or substitute service (obligatory only for men) was to be immediately admitted to the training and did not have to satisfy any further requirements in that regard, whereas the admission of other applicants (female and male) could be deferred by up to 12 months. Thus, the question arose if such regulations gave rise to direct or indirect discrimination on grounds of sex. Advocate General Francis G. Jacobs in his opinion given in this case first noticed that:

the discrimination is direct where the difference in treatment is based on a criterion which is either explicitly that of sex or necessarily linked to a characteristic indissociable from sex. It is indirect where some other criterion is applied but a substantially higher proportion of one sex than of the other is in fact affected (§ 33).

Then he pointed out that under German law priority was given for those applicants who had completed military or civilian service and women were excluded from this group. According to Advocate General their situation seemed to be similar to the situation of pregnant women but there was a distinction between them as no legislation “can render men capable of bearing children, whereas legislation might readily remove any discrimination between men and women in relation to compulsory national service” (§ 40). Consequently, he came to conclusion that in the present case there was no direct discrimination as the rule in issue differentiated between those who had and those who had not completed compulsory national service as a result of a statutory obligation, and not between men and women as such. Advocate General’s argumentation concerning the difference between the situation resulting from the physical characteristics of one sex such as pregnancy and from national regulations is not convincing, because in fact the measure has the same effect – all women are at disadvantage.

Unfortunately, the Court of Justice took similar approach though it did not explain it further. The Court just stated that the national rules did not constitute direct discrimination as according to the settled case-law “only provisions which apply differently according to the sex of the persons concerned can be regarded as constituting discrimination directly based on sex” (§ 33). However, they gave rise to indirect discrimination in favour of men since women were not required to do military or civilian service and therefore, could not benefit from the priority in access to practical legal training. The Court of Justice also found that such national provisions could be maintained if they “are justified by objective reasons and prompted solely by a desire to counterbalance to some extent the delay resulting from the completion of compulsory military or civilian service” (§ 47).

Both Advocate General’s opinion and the Court's decision were criticised in academic writing where it was suggested that in view of their substantive effects such case should be analysed in the context of direct discrimination (see Ch. Tobler 2005: 312-313 with further references). It was underlined that the distinction between those forms of discrimination should also take into account the effect of the measure. If it turns out that a criterion, though formally neutral, has in fact the

effect of favouring all persons of one group and/or of disadvantaging all persons of the other group, it must be understood as leading to direct discrimination (Ch. Tobler 2005: 316).

This approach has been gradually adopted by the Court of Justice. First signs of the change of its formal attitude towards grounds of discrimination can be seen in the case Nikoloudi (C-196/02 [2005] ECR I-1789). It concerned General Staff Regulations applied by the defendant company - Organismos Tilepikinonion Ellados AE that employed Vasiliki Nikoloudi. Under those rules only women could be employed in half-time cleaning posts. At the same time they provided that temporary employees must be employed full-time in order to be able to be appointed to an established post. The specific collective agreements clarified the conditions for this appointment - they made applications by temporary employees conditional on full-time employment and two years' continuous service. The plaintiff worked full-time for a little less than two years and for this reason she was not appointed to an established post. Before the national court Ms Nikoloudi contended that her exclusion from the provisions of the specific collective agreements constituted discrimination on grounds of sex prohibited by Community law. However, the defendant stated that she could not have been appointed to the established staff since she did not fulfil the condition of full-time employment, which applied regardless of the person's sex. Probably therefore, both the plaintiff, the European Commission and the Advocate General Christine Stix-Hackl were of the opinion that this case was an example of indirect sex discrimination. The Court of Justice took another approach and stated that:

(…) the subsequent exclusion of a possibility of appointment as an established member of 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 on grounds of sex (…) should the premiss that only part-time female cleaners have been denied the possibility of appointment as an established member of staff prove incorrect, and if a much higher percentage of women than men has been affected by the provisions of the agreements at issue, the exclusion, brought about by those agreements, of the appointment of part-time temporary staff as established staff constitutes indirect discrimination (§ 40 and 57).

It means that the Court of Justice made the qualification of the rules at issue dependant on whether the group at disadvantage was composed exclusively or predominantly of women. In the first situation there would be a case of direct discrimination, even though the provisions of the General Staff Regulations and collective agreements did not refer to sex.

The Court of Justice took similar approach in the case Maruko (C-267/06 [2008] ECR I-1757) which concerned discrimination based on sexual orientation. Mr Maruko entered into a registered partnership with a designer of theatrical costumes who had been a member of the Versorgungsanstalt der deutschen Bühnen (VddB) and was socially insured in that pension fund. After his death Mr Maruko applied to the VddB for a widower's pension but the application was rejected on the ground that its internal regulations did not provide for such an entitlement for surviving life partners. Consequently, he brought an action before the Bayerisches Verwaltungsgericht München (Bavarian Administrative Court, Munich) claiming that the refusal of the survivor's benefits amounted to discrimination on grounds of sexual orientation of his partner. Both the plaintiff and the European Commission maintained that refusal to grant the survivor's benefit to life partners constituted indirect discrimination, while the national court referred in its questions to Article 2 (2) (a) of Directive 2000/78 which contains definition of direct discrimination. Advocate General Ruiz-Jarabo Colomer in his opinion given in this case underlined that:

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refusal to grant a pension on the grounds that a couple has not married, where two persons of the same sex are unable to marry and have entered into a union which produces similar effects, constitutes indirect discrimination based on sexual orientation, contrary to Article 2 of Directive 2000/78 (§ 102)

However, the Court of Justice first recalled the definitions of both forms of discrimination. Then, it analysed Mr Maruko situation in the light of information on German law given by the referring court. According to it Germany created for persons of the same sex a separate regime, the life partnership, the conditions of which had been gradually made equivalent to those applicable to marriage. This partnership, while not identical to marriage, placed persons of the same sex in a situation comparable to that of spouses so far as the survivor's benefit at issue in the main proceedings was concerned. However, the entitlement to that survivor's benefit was restricted, under the provisions of the VddB Regulations, to surviving spouses and was denied to surviving life partners. Therefore, the Court stated that:

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 on grounds of sexual orientation, within the meaning of Articles 1 and 2(2)(a) of Directive 2000/78 (§ 72)

Thus, the Court of Justice found that in this case there was a direct sexual orientation discrimination if, under German law, registered partnership places persons of the same sex in a situation comparable to that of spouses. The referring court was to determine whether there was such a comparability in relation to the survivor's benefit provided for under the occupational pension scheme managed by the VddB.

This line of reasoning was maintained in the case Römer (C-147/08 [2011] ECR I-3591) which concerned regulations on supplementary pensions payments to former employees of the Freie und Hansestadt Hamburg and their survivors. Those rules differentiated, in calculating the amount of pension payable, between married pensioners and all other pensioners. Consequently, supplementary pension paid to a married pensioner was more favourable than that paid to a pensioner who had entered into a registered life partnership with a person of the same sex.

Advocate General Nilo Jääskinen in his opinion given in this case stated that an increase in a retirement pension based solely on the criterion of marriage constituted direct discrimination on the basis of sexual orientation. Therefore, the national court should consider the comparability of the situations of persons having entered into a contract of marriage and that of persons linked by a registered civil partnership under the national law. If, however, it is established that life partners and spouses are not in comparable situations as regards the pension concerned, which would preclude the existence of direct discrimination, then the national court should take into account indirect discrimination. In this regard it should determine if the provisions, which provide a more favourable method of calculating a supplementary retirement pension for a married pensioner, generate a particular disadvantage to the detriment of any pensioner who has entered into a registered life partnership, and do not objectively reflect a legitimate aim or do not constitute an appropriate and necessary means of attaining that aim (§ 113).

The Court of Justice came to similar conclusion but it did not explain why the rules at issue constituted direct discrimination. The Court just stated that Directive 2000/78 precluded national provisions:

under which a pensioner who has entered into a registered life partnership receives a supplementary retirement pension lower than that granted to a married, not permanently separated, pensioner, if in

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the Member State concerned, marriage is reserved to persons of different gender and exists alongside a registered life partnership such as that provided for by the LPartG, which is reserved to persons of the same gender, and there is direct discrimination on the ground of sexual orientation because, under national law, that life partner is in a legal and factual situation comparable to that of a married person as regards that pension (§ 52).

The Court of Justice left the national court with the task of assessing the comparability, but gave it some instructions – it should focus on the respective rights and obligations of spouses and persons in a registered life partnership, which are relevant taking account of the purpose of and the conditions for the grant of the benefit in question. Thus, it should be noticed that both Maruko and Römer cases concerned rules which were not based on sexual orientation but an apparently neutral criterion of marriage and yet their result was such that all persons in registered partnerships were at disadvantage.

It seems, therefore, that the Court has shifted the focus from the form to the content of the measure when qualifying it as discriminatory, either directly or indirectly. It is not important whether it refers to a forbidden criterion or not, but whether it has a similar effect to measures directly based on this criterion - the whole group of people protected is at disadvantage. This means that direct discrimination now includes cases where reliance on a formally neutral criterion in fact affects one group only; in contrast, indirect discrimination relates to cases where an apparently neutral criterion has an effect that is less far-reaching but still reaches a certain level (Ch. Tobler 2008: 50).

5. The importance of the scope of justification for demarcation of direct and indirect discrimination

Direct and indirect discrimination differ from each when it comes to the range of possible justification grounds. The traditional approach in this regard is that direct discrimination can be justified only by particular reasons clearly set out in legislation. Therefore, the list of justification grounds is a closed one. In contrast, in the context of indirect discrimination it is possible to refer to the legitimate aims which are not further defined in the legislation. Thus, objective justification operates in an open system and the range of possible justification grounds is by definition wider than the specific justification grounds expressly mentioned in EU non-discrimination law (Ch .Tobler 2005: 316)

In practice, however, the traditionally perceived dividing line is not a strict one – the examples of a different approach to justification can be found both in the case-law of the Court of Justice and specific regulations of the secondary law of the EU. With regard to the position of the Court it should be noticed that in certain cases it took into account the possibility to justify direct discrimination although it was not predicted in the provisions of the Treaty. For instance, article 18 of the Treaty on the functioning of the European Union (TFEU) which relates to discrimination on grounds of nationality and article 40 (2) of the TFEU which provides for the prohibition of any discrimination between producers or consumers in the framework of the common organization of agricultural markets do not refer to the possibility of justification. However, the Court in the case Sermide (106/83 [1984] ECR 4209) underlined that:

Under the principle of discrimination between Community producers or consumers, which is enshrined in the second subparagraph of article 40 (3) of the EEC Treaty (now article 40 (2) of the TFEU) and which includes the prohibition of discrimination on grounds of nationality laid down in the first paragraph of article 7 of the EEC Treaty (now article 18 of TFEU), comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified (§ 28).

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Thus, the Court of Justice referred to objective justification in a general way and did not provide that it could apply only in the context of indirect discrimination. Such an approach may be connected with the specific nature of the common agricultural policy – in this area the EU institutions have a discretionary power which corresponds to the political responsibilities imposed on them by the Treaty[3]. This power allows to take into account different interests and factors such as political, economic, social and monetary (see further J. A. McMahon 2000: 36). Undoubtedly, the concept of objective justification is useful in this context also in cases of direct discrimination.

It seems, therefore, that because of the specific nature of the common agricultural policy the position of the Court should be treated as unique, in particular that the possibility of justifying direct discrimination has not be confirmed in relation to other Treaty provisions, including article 18 of the TFEU (J. Maliszewska-Nienartowicz 2012: 359). However, the case-law of the Court of Justice on this regulation is not entirely clear. For instance, in the case Saldanha and MTS Securities Corporation (C-122/96 [1997] ECR I-5325) first it found direct discrimination on grounds of nationality but then it considered the defendant's arguments on objective justification. Finally, the Court stated that:

even though the object of a provision such as that at issue in the main proceedings, namely that of ensuring enforcement of a decision on costs in favour of a defendant who has been successful in proceedings, is not as such contrary to Article 6 of the Treaty (now article 18 of the TFEU), the fact remains that that provision does not require Austrian nationals to provide security for costs, even if they are not resident and have no assets in Austria and are resident in a non-member country in which enforcement of a decision on costs in favour of a defendant is not guaranteed.

Consequently, the Court held that this national provision was incompatible with the general prohibition of discrimination on grounds of nationality. Thus, indirectly it confirmed that it was not possible to justify measures based directly on nationality. However, it seems that the Court should be more clear and explicitly refer to this issue by underlining that direct discrimination on grounds of nationality can be justified only when it is predicted in the legal provisions. In any case, in academic writing it is stressed that the prohibition of direct discrimination on grounds of nationality has an absolute character and as such cannot be justified (see A. Wróbel 2012: 401 with further references).

On the whole it can be seen that the Court of Justice does not always take a traditional approach according to which direct discrimination can be justified only by particular reasons clearly set out in legislation. It would be good if it was more precise and explicitly stated that in contrast to indirect discrimination direct form cannot be justified if it is not predicted in the legal provisions. Such a case-law would contribute to a better demarcation of these legal concepts.

Unfortunately, also certain provisions of secondary law of the EU are formulated in a way which raises doubts whether justification is an important factor for distinguishing both forms of discrimination. The best example in this regard is the regulation of article 6 of Directive 2000/78. As it was mentioned above, it provides that the Member States may justify different treatment on grounds of age "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". It also lists the examples of such differences of treatment: "a) the setting of special

[3] It was underlined by the Court of Justice in many cases see e.g. case 265/87, Hermann Schräder HS Kraftfutter GmbH & Co. KG v. Hauptzollamt Gronau [1989] ECR 2237, case C-8/89 Vincenzo Zardi v. Consorzio agrario provinciale di Ferrara [1990] ECR I-2515, case C-331/88 The Queen v. Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa i inni [1990] ECR I-4023, joined cases C-133,300 and 362/93 Antonio Crispoltoni v. Fattoria Autonoma Tabacchi and Giuseppe Natale and Antonio Pontillo v. Donatab Srl. [1994] ECR I-4863.

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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".

This provision refers generally to different treatment which means that it includes both direct and indirect discrimination. As a result, it predicts an open-ended possibility for Member States to justify direct age discrimination. Therefore, it was criticised in the academic writing (see e.g. M. Bell and L. Waddington 2001: 599). It was also underlined that the regulation of article 6 of Directive 2000/78 blurs a distinction between direct and indirect discrimination (H. Meenan 2007: 304). In fact it refers to elements which are typical for the latter – justification by legitimate aims whose examples are listed and compatibility of the measures with the principle of proportionality.

This was underlined by the Court of Justice in the case Age Concern England (C-388/07 [2009] ECR I-1569). The national court asked several questions concerning article 6 inter alia if "there is any, and if so what, significant practical difference between the test for justification set out in Article 2(2) of Directive in relation to indirect discrimination, and the test for justification set out in relation to direct age discrimination at Article 6(1) of Directive?" The Court of Justice generally noticed that:

in choosing the means capable of achieving their social policy objectives, the Member States enjoy broad discretion. However, that discretion cannot have the effect of frustrating the implementation of the principle of non-discrimination on grounds of age. Mere generalisations concerning the capacity of a specific measure to contribute to employment policy, labour market or vocational training objectives are not enough to show that the aim of that measure is capable of justifying derogation from that principle and do not constitute evidence on the basis of which it could reasonably be considered that the means chosen are suitable for achieving that aim [see, by way of analogy, Case C-167/97 Seymour-Smith and Perez [1999] ECR I-623, paragraphs 75 and 76] (§ 51).

It should be noticed that the Court of Justice referred directly to the case which concerned indirect discrimination on grounds of sex. However, in the further part of the judgment it underlined that "the scope of Article 2 (2) (b) and that of Article 6 (1) of Directive 2000/78 are not identical". The former is applied only in relation to indirect discrimination while the latter allows Member States to introduce into their national law measures providing for differences in treatment on grounds of age which fall within the category of direct discrimination. The Court also noted that article 6 (1):

gives Member States the option to provide, within the context of national law, that certain forms of differences in treatment on grounds of age do not constitute discrimination within the meaning of that directive if they are 'objectively and reasonably' justified. Although the word 'reasonably' does not appear in Article 2(2)(b) of the directive, it must be observed that it is inconceivable that a difference in treatment could be justified by a legitimate aim, achieved by appropriate and necessary means, but that the justification would not be reasonable. Accordingly, no particular significance should be attached to the fact that that word was used only in Article 6(1) of the directive. However, it is important to note that the latter provision is addressed to the Member States and imposes on them, notwithstanding their broad discretion in matters of social policy, the burden of establishing to a high standard of proof the legitimacy of the aim pursued (§ 65).

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It can be said that the Court recognises the differences in the scope of application of article 2 (2) (b) and article 6 (1) of Directive 2000/78, in particular the fact that the latter applies to direct discrimination, but does not set other standards of justification in relation to both provision. The result of this approach can be such that in cases of discrimination on grounds of age the Member States will rely on article 6 (1) of Directive 2000/78 rather than on its regulations concerning indirect discrimination. This is confirmed by the case-law of the Court which relates mainly to this provision. The result of the explicit rules of Directive 2000/78 on justification of direct age discrimination is such that in these cases it does not matter whether a measure leads to direct or indirect discrimination as both forms can be justified in the same way.

The presented examples of case-law of the Court of Justice and the provisions of secondary law of the European Union show that sometimes it is possible to justify direct discrimination in a way characteristic for indirect discrimination. It seems, however, that such a possibility is connected with the specific character of areas within which directly discriminatory measures are undertaken. Common agricultural policy involves political responsibility of the EU institutions and therefore, this is an area of their wide discretion. In the case of discrimination on grounds of age, the situation on labour markets of the Member States is taken into account. Consequently, the preamble of Directive 2000/78 underlines that ‘it is essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited’.

6. Conclusion

It can be concluded that although the EU law contains separate definitions of direct and indirect discrimination, in practice it is not always so clear what form occurs in a particular case. There is, however, no doubt that apart from the ground on which a measure is based also its effect should be taken into account. This is a rather recent approach of the Court of Justice as at the beginning it presented a formal attitude – any measure that did not formally rely on a prohibited criterion was assessed in the context of indirect discrimination, even if its effect was practically the same as in the case of direct discrimination. In cases Nikoloudi, Maruko and Römer the Court decided to take into account also substantive effects of the provisions and came to conclusion that they led to direct discrimination since the whole protected group was at disadvantage. Such an approach better addresses the interests of those affected by discriminatory measures, taking into account the fact that generally direct discrimination cannot be justified in such a broad way as indirect one.

However, the case-law of the Court of Justice concerning the scope of justification in the context of both forms of discrimination is not always clear. It happens that the Court takes into account the possibility to justify direct discrimination although it is not predicted in the legal provisions. It refers generally to objective justification which is characteristic for indirect discrimination. Such a case-law raises doubts about the importance of justification in distinguishing these legal concepts. Similar can be said about certain legal provisions, in particular about article 6 of Directive 2000/78 which allows for an open-ended possibility for the Member States to justify direct age discrimination.

Undoubtedly, the lack of a uniform approach to the issue of justification does not help in the demarcation of these legal concepts. However, the general possibility of justification of both forms, regardless of the legal provisions, does not seem to be a good solution. It should be underlined that in the case of direct discrimination a measure is based on a prohibited ground and therefore, it can have an intended character. Indirect discrimination is usually not connected with the intention of unequal treatment – a discriminatory effect may be even accidental. It appears that this is a sufficient reason for a broader range of possible justification grounds in the context of the latter.

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