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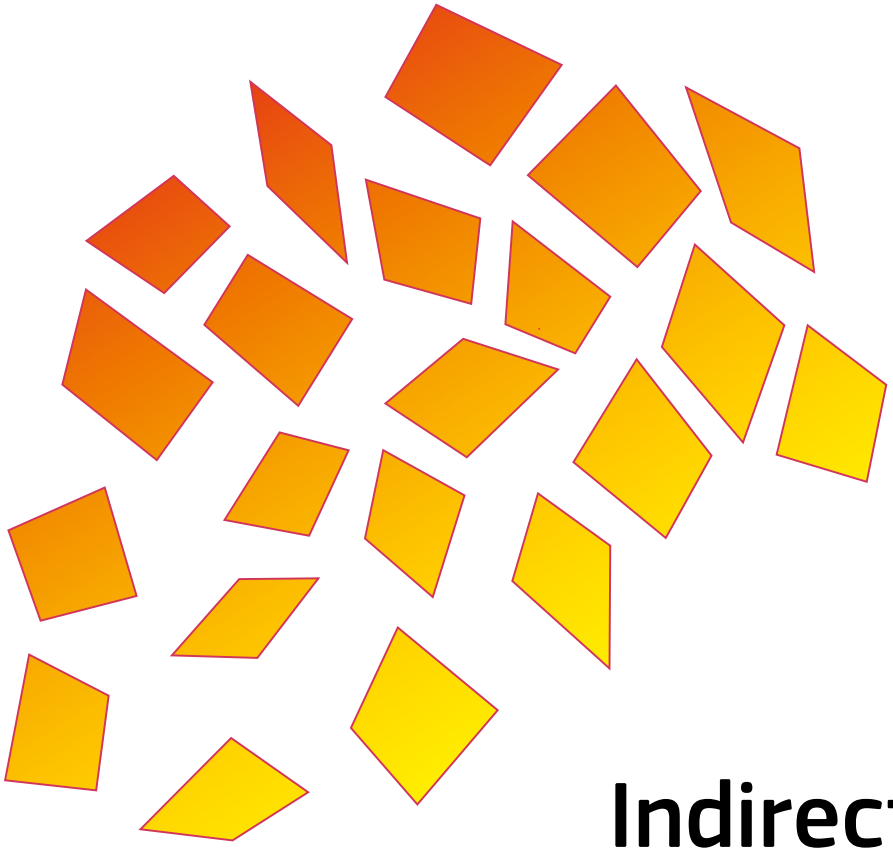

Indirect sex discrimination in employment

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Indirect sex discrimination in employment

Theoretical analysis and reflections on the CJEU case law and national application of the concept of indirect sex discrimination

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Executive summary

The concept of indirect sex discrimination challenges apparently neutral provisions, criteria or practices that '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' (Article 2(1)(b) Recast Directive 2006/54/EC). It thus focuses on the outcomes of the measures, and deems them potentially discriminatory (i.e. unless justified) if they create a particular disadvantage for men or women. Whether there is a direct reference to 'sex' as the protected characteristic is irrelevant. Moreover, the CJEU has long dismissed the relevance of intent within the context of indirect and direct sex discrimination. The focus on outcomes gears the concept towards exposing systemic or structural gender disadvantages and vulnerabilities in order to advance substantive equality.

Systemic or structural gender inequality refers to the current gendered structures within our society, including gender roles and expectations, gender stereotypes, gendered power relations, dependencies and lack of recognition that create significant disadvantages for women. Within the sphere of employment, these disadvantages can be observed by reference to the gender pay and pension gap, the so-called motherhood penalty, the significant gendered imbalance regarding parental leave, and part-time work contracts, and the gendered segregation of the labour market with the general devaluation of 'typical' female work. However, while these disadvantages are readily identifiable, it is much more difficult to identify a single culprit or act that creates the disadvantage and can thus be held responsible or changed. Rather, they are often the result of a web of disadvantages and acts of indirect and direct discrimination that decrease women's opportunities, competitiveness and recognition, and make them particularly vulnerable in both the public and private spheres. For equality law to foster substantive gender equality it needs to recognise these structural disadvantages in order to enhance women's opportunities, visibility and protection.

The recognition of indirect sex discrimination allows some of the structural gender inequality to be addressed by exposing measures that do not directly relate to sex but nevertheless disadvantage women more than men. Most prominently, the CJEU has explored these disadvantages in relation to part-time work and parental leave. Since women are much more likely to work part time and/or take parental leave, any disadvantage connected to either will disproportionally affect women. Accordingly, measures, criteria and practices that create such a disadvantage need to be justified by reference to factors unrelated to any discrimination on grounds of sex. Specifically, they need to 'correspond to a real need on the part of the undertaking, [be] appropriate with a view to achieving the objective pursued and [be] necessary to that end' (*Bilka*). In *Roks*, *Steinicke*, and *Hill and Stapleton*, the CJEU emphasised that budgetary or cost concerns can influence the choice of social policy and the scope of social protection but 'they cannot themselves constitute the aim pursued by that policy and cannot, therefore, justify discrimination against one of the sexes.' Otherwise, the application of the equality principle would depend on the financial health of the Member State or company. Financial hardship or limitations should thus be shared equally between the sexes.

Moreover, indirect sex discrimination is not limited to challenging measures that quite obviously disadvantage women due to persisting gender roles and division of labour within the Member States. Rather, its focus on unequal outcomes alone can uncover various disadvantages that are less than obvious. For example, promotion schemes or qualification assessments that systematically disadvantage women may be challenged under the scope of indirect sex discrimination, even if it is not always clear why these schemes and assessments create the disadvantages. As such, it can potentially expose unconscious

gender biases within promotion and recruitment processes that are not at all obvious but nevertheless curtail women's opportunities.

In this way, the concept of indirect sex discrimination can be a powerful tool to expose existing gender vulnerabilities and challenge disadvantages related to them. However, its symmetric nature, focusing on comparative disadvantage alone, is not enough to ensure substantive gender equality, let alone equality more broadly. The concept prevents duty bearers (e.g. social partners, employers, legislators) from exploiting current inequalities, but it does not impose a duty to ensure substantive equality. If a measure is justified, it remains as it is and thus the disadvantage continues.

Given the systemic gender inequality persisting within the Member States, the concept of indirect sex discrimination should be dominant within national legal discourses concerned with sex discrimination. After all, disadvantages flowing from systemic gender inequality occur often and the prohibition of indirect sex discrimination seems much better equipped to address these disadvantages, even if direct sex discrimination can indeed also address structural disadvantages, for example in relation to pregnancy discrimination and different retirement ages for men and women. However, national case law that engages with indirect sex discrimination is scarce and mostly focuses on the most obvious forms of indirect sex discrimination, such as discrimination based on part-time or parental leave. Beyond that, the concept is often poorly understood and loosely applied without recognition of the two-pronged approach that requires the claimant to establish a prima facie case of indirect sex discrimination by reference to the particular disadvantage and the defendant to provide any objective justifications that need to be assessed very strictly.

Indirect sex discrimination focuses on comparative disadvantages and chapter 4 provides a detailed discussion of the various aspects that the comparative analysis entails, and how they have been addressed by the CJEU and the national courts. Indirect sex discrimination focuses on the effect of measures on different sex groups. Namely, it considers whether the measure is more likely to disadvantage or advantage one sex group over the other and thus provides a comparative disadvantage for one of them. It requires the identification of a disadvantage, a pool of comparators and a disproportionate burden. Specific aspects relating to this frame of reference should be kept in mind.

First, indirect sex discrimination does not require the comparison of workers in the same or a similar situation only. After all, the fact that they are not in a similar situation is the reason why these apparently neutral measures affect them differently. The pool of comparators is thus not limited to that extent. Rather, the pool should include all who are affected by the challenged measure, criteria or practice. However, in equal pay cases, all comparators must provide work of equal value.

Secondly, while the CJEU has accepted the *pro-rata temporis* principle regarding remuneration relating to the hours worked, it is not always an appropriate tool to assess the treatment and pay of workers with different employment contracts. For example, compensatory measures may have to be provided in full and seniority cannot simply be reduced due to part-time work. Moreover, the report discusses that a substantive rather than formal assessment of the treatment, considering the broader implications of the measures, criteria, or practices, is better suited to recognising and addressing systemic gender disadvantages.

Thirdly, while the CJEU has upheld a single source principle, i.e. that there needs to be a body that is responsible for the inequality and that could restore equal treatment, it is not limited to one employer. Collective agreements, legislation and even loose company structures including subsidiaries could constitute the single source and thus all affected by those things can be included in the comparison.

Fourthly, while most of the CJEU and national case law focuses on 'particular disadvantages' demonstrated by reference to statistical data, the equality directives as well as the CJEU case law have accepted qualitative reasoning as well. Accordingly, statistical data is not always necessary if not readily available,

and one can assess the substance of the measure qualitatively, considering the potential impact on different groups within society. However, statistics remain useful because they let the facts speak for themselves without the need for further exploration of why these disadvantages occur and who is affected. Specifically, it is not necessary to explain why the disadvantage occurs if it is demonstrated statistically.

Finally, the interpretation of the objective justification is strict regarding its appropriateness and necessity. Accordingly, it is not sufficient to demonstrate that the measure indeed achieves the legitimate aim. Rather, if other, less discriminatory, measures to reach the aim are available, the measure chosen cannot be considered necessary and there will therefore be no objective justification. The objective justification is also limited in scope, as it only considers the legitimate aim and the measures to achieve those aims.

For the prohibition of indirect sex discrimination to address systemic inequality more comprehensively, several aspects and possible claims deserve further attention, as discussed in chapter 5. First, the way in which qualitative reasoning rather than statistical evidence can be used to demonstrate a particular disadvantage needs further exploration, as a combination of statistical evidence and qualitative argument seems to be the most common approach when courts engage in a qualitative reasoning. Specifically, qualitative reasoning can be useful if the statistical data is not available or not significant due to the small number of workers included in the comparison. However, one also needs to avoid the reinforcement of gender stereotypes.

Secondly, the potential protection of men in 'typical' female gender roles (e.g. working part-time due to care responsibilities, or taking parental leave) deserves further exploration under the scope of indirect sex discrimination law. These men's individual experience may be similar to that of women in the same situation, but one may consider that they are unable to claim indirect sex discrimination because men are not disadvantaged as a group. However, if the disadvantage is assessed objectively and separately from the claimant concerned, it should not matter that the claimant is male if he suffers alongside the disadvantaged group. Some national courts have indeed adopted this understanding.

Thirdly, the prohibition of indirect sex discrimination could be of great use in considering intersectional disadvantages that include more than one protected characteristic. Since indirect sex discrimination law does not require that all women be disadvantaged but instead focuses on disproportionate burdens, it can consider disadvantages experienced by subgroups of women who are in a specific situation. The CJEU for example recognised disadvantages experienced by older women and some national courts have considered the specific situation of mothers who are single parents or women from religious minorities (i.e. regarding the ban on headscarves).

Finally, it is important to notice that indirect sex discrimination law can impose duties akin to duties of reasonable accommodation. However, these duties are not focused on the individual needs but rather require structural changes. Within that context, a qualitative reasoning considering substantive assessment of measures alongside statistical data may be specifically useful.

Chapter 6 discusses the relevance of indirect sex discrimination law within the current labour markets. This includes the consideration of new forms of labour that may pose specific challenges to the application of indirect sex discrimination law as well as continuing the problems of the most common forms of indirect sex discrimination, in which combating discrimination based on part-time work and parental leave has long been the primary focus. However, discrimination within those areas persists. Moreover, the focus on comparative disadvantages is unable to address all detrimental effects that are the long-term consequences of these working arrangements. For example, equal pay of full-time and part-time workers based on *pro-rata temporis* will not itself solve the pay and pension gap, as part-time workers' overall income will always be lower than that of full-time workers, which then also has consequences for the pension gap. Moreover, the part-time rates vary significantly within different Member States. The extensive case law on discrimination in part-time work may thus be considered to be less relevant in some Member States. Parental leave also continues to have disadvantages, as workers lose pay and often

struggle to return to their previous position. Parental leave arrangements also vary significantly between Member States and at the national level it is not always easy to distinguish between maternity leave, paternity leave and parental leave.

Finally, the current understanding of indirect sex discrimination may struggle to address modern labour market arrangements that are characteristic of flexibility regarding working time, hours, and place and include much quasi-self-employed workers (e.g. those who work within the gig economy, platform workers). These difficulties relate to the potential lack of a single source that can address the disadvantage within the segregated labour market or, regarding quasi-self-employed workers, the difficulty of addressing disadvantages that go to the core of the contractual arrangements (e.g. if one challenges the lack of minimum pay in a zero-hour/on-call contract), and how algorithms and feedback-based remuneration perpetuate gender biases. Moreover, flexible remote working arrangements may enable the coordination of care and work responsibilities, but whether this is indeed possible depends on how these new flexibilities are conceived and whether they consider the needs of the workers. For indirect sex discrimination law to remain meaningful within these new working arrangements that break with the typical employer-employee relationship, it needs to embrace a more systemic analysis of particular disadvantages with reference to sector-specific analysis. In that respect, qualitative reasoning that considers disadvantages in a systematic rather than a purely statistical manner would seems to be the most useful approach.

To address these old and new challenges regarding the application of indirect sex discrimination law within the current labour market, the report suggests two strategies. The first strategy is focused on the clarification of the concept to encourage and enhance its proper application at the national level. As the national approaches towards the application of indirect sex discrimination law differ vastly and often demonstrate poor understanding of the concept, its scope and potential, this will require the development of detailed practical guidance including multiple examples for national courts as well as potential claimants, interest groups and equality bodies. The second strategy is focused on the concept's ability to challenge systemic disadvantages within the segregated and fragmented modern labour market. Specifically, it is suggested that the 'particular disadvantages' could be exposed by consideration of systemic sector-wide gendered disadvantages to overcome some of the limits posed by the single source requirement, the frame of reference and the focus on statistical evidence.

Résumé

Le concept de discrimination indirecte fondée sur le sexe vise à contester des dispositions, critères ou pratiques apparemment neutres qui «désavantageraient particulièrement des personnes d'un sexe par rapport à des personnes de l'autre sexe, à moins que cette disposition, ce critère ou cette pratique ne soit objectivement justifié par un but légitime et que les moyens pour parvenir à ce but soient appropriés et nécessaires» (article 2, point 1) b), de la directive de refonte 2006/54/CE). Il porte donc sur les effets des mesures et considère que celles-ci sont potentiellement discriminatoires (à moins d'être justifiées) lorsqu'elles engendrent un désavantage particulier pour les hommes ou pour les femmes – peu importe qu'il y ait ou non référence directe au «sexe» en tant que caractéristique protégée. La CJUE a de surcroît rejeté depuis longtemps la pertinence de l'intention dans le contexte de la discrimination indirecte et directe fondée sur le sexe. L'accent mis sur les effets vise à orienter le concept vers une mise en lumière de désavantages et vulnérabilités systémiques ou structurels liés au genre dans le but de réaliser des avancées vers une véritable égalité.

L'inégalité systémique ou structurelle entre hommes et femmes concerne les structures fondées sur le genre actuellement présentes au sein de notre société, en ce compris les rôles, attentes et stéréotypes liés au sexe, les rapports de force fondés sur le sexe, les situations de dépendance et le manque de reconnaissance qui génèrent des préjudices majeurs pour les femmes. Ces préjudices se manifestent dans le domaine de l'emploi au travers d'un écart de rémunération et de pension entre hommes et femmes, d'une «sanction de la maternité», d'un déséquilibre majeur selon le sexe pour ce qui concerne le congé parental et les contrats de travail à temps partiel, et de la ségrégation sexiste d'un marché de l'emploi caractérisé par une dévalorisation globale du travail «typiquement» féminin. Or, si ces désavantages sont aisément identifiables, il s'avère beaucoup plus difficile de déterminer un coupable ou un acte unique qui, étant à l'origine du préjudice causé, pourrait par conséquent être tenu pour responsable ou faire l'objet d'une modification. Le préjudice en question résulte le plus souvent d'un faisceau de désavantages et d'actes relevant d'une discrimination indirecte ou directe, qui restreignent les opportunités, la compétitivité et la reconnaissance des femmes, et qui les rendent particulièrement vulnérables à la fois dans la sphère publique et dans la sphère privée. Pour promouvoir une véritable égalité des genres, le droit relatif à l'égalité doit impérativement reconnaître ces préjudices structurels en vue d'améliorer les possibilités, la visibilité et la protection offertes aux femmes.

La reconnaissance de la discrimination indirecte fondée sur le sexe permet de faire état de certaines inégalités structurelles en mettant en évidence des mesures qui ne concernent pas directement le sexe mais qui n'en défavorisent pas moins les femmes plus que les hommes. C'est principalement en rapport avec le travail à temps partiel et le congé parental que la CJUE s'est penchée sur cette problématique. Étant donné que les femmes sont beaucoup plus susceptibles de travailler à temps partiel et/ou de prendre un congé parental, elles sont affectées de façon disproportionnée par tout désavantage lié à l'une ou à l'autre de ces situations. Les mesures, critères et pratiques générant ce type de désavantage doivent dès lors être justifiées par référence à des facteurs indépendants de toute discrimination fondée sur le sexe. Plus précisément, il faut qu'ils «répondent à un véritable besoin de l'entreprise, soient aptes à atteindre l'objectif en question et soient nécessaires à cet effet» (*Bilka*). Dans ses arrêts *Roks*, *Steinicke* et *Hill & Stapleton*, la CJUE a souligné que des considérations d'ordre budgétaire ou de coût peuvent être à la base des choix de politique sociale et influencer la nature et l'étendue des mesures de protection sociale, mais que celles-ci «ne constituent pas en elles-mêmes un objectif poursuivi par cette politique et, partant, ne sauraient justifier une discrimination au détriment de l'un des sexes». S'il en était autrement, l'application du principe d'égalité dépendrait de la santé financière de l'État membre ou de l'entreprise. Il faut donc que les difficultés ou contraintes financières soient assumées de manière égale entre les sexes.

Il convient d'ajouter que la discrimination indirecte fondée sur le sexe ne se limite pas à la mise en question de mesures qui défavorisent manifestement les femmes en raison de la persistance de rôles et d'une division du travail fondés sur le genre au sein des États membres: sa focalisation sur l'inégalité des seuls effets permet au contraire de mettre au jour des préjudices qui sont loin d'être visibles. Des systèmes de promotion ou des évaluations des qualifications, par exemple, peuvent être contestés comme relevant d'une discrimination indirecte fondée sur le sexe, même s'il n'est pas toujours possible d'établir clairement pourquoi les systèmes et évaluations en cause engendrent des désavantages. C'est ainsi que la discrimination indirecte fondée sur le sexe peut potentiellement révéler l'existence, dans certains processus de promotion et de recrutement, de préjugés sexistes non conscients qui, sans être évidents du tout, n'en restreignent pas moins les possibilités ouvertes aux femmes.

Le concept de discrimination indirecte fondée sur le sexe peut constituer de cette façon un puissant moyen de mettre en lumière les vulnérabilités existantes selon le genre et de lutter contre les désavantages qui y sont associés. Son caractère symétrique, axé sur le seul désavantage comparatif, ne suffit cependant pas à garantir une égalité de fond entre les sexes, ni a fortiori une égalité plus générale. Le concept empêche des entités responsables (tels que des partenaires sociaux, des employeurs ou des législateurs) d'exploiter les inégalités actuelles, mais il n'impose aucune obligation de garantir une égalité substantielle. A partir du moment où une mesure est justifiée, elle est maintenue telle quelle et, par conséquent, le désavantage persiste.

Face à cette persistance de l'inégalité systémique liée au genre au sein des États membres, une prédominance du concept de discrimination indirecte fondée sur le sexe s'impose au niveau des discours juridiques nationaux portant sur la discrimination fondée sur le sexe. Après tout, les désavantages issus d'une inégalité systémique entre les genres sont fréquents et une interdiction de discrimination indirecte fondée sur le sexe apparaît comme une approche beaucoup plus efficace pour y remédier, étant entendu que la discrimination directe fondée sur le sexe peut concerner elle aussi des désavantages structurels, en rapport notamment avec la discrimination liée à la grossesse et la différence d'âge de départ à la retraite des hommes et des femmes. La jurisprudence nationale relative à la discrimination indirecte fondée sur le sexe reste toutefois peu abondante et porte essentiellement sur ses formes les plus manifestes telles que la discrimination liée au travail à temps partiel ou au congé parental. En dehors de ce type de cas, le concept est souvent mal compris et appliqué de façon approximative sans reconnaître l'approche en deux volets exigeant que le requérant établisse une présomption de discrimination indirecte fondée sur le sexe par référence à un préjudice particulier et que la partie défenderesse fournisse des justifications objectives, lesquelles seront très rigoureusement analysées.

La discrimination indirecte fondée sur le sexe se concentre sur les désavantages comparatifs et le chapitre 4 propose un examen approfondi des divers aspects que l'analyse comparative implique et de la manière dont ils ont été abordés par la CJUE et les juridictions nationales. La discrimination indirecte fondée sur le sexe s'intéresse essentiellement à l'incidence des mesures sur différents groupes sexuels. Il s'agit, en d'autres termes, d'examiner si la mesure en cause est susceptible de défavoriser ou de favoriser le groupe appartenant à un sexe par rapport à l'autre, et d'établir ainsi un désavantage comparatif pour l'un d'eux. La démarche requiert l'identification d'un désavantage, un certain nombre de comparateurs et une charge disproportionnée. Plusieurs aspects propres à ce cadre de référence doivent être gardés à l'esprit.

Premièrement, la discrimination indirecte fondée sur le sexe n'exige pas que la comparaison se fasse uniquement avec des travailleurs se trouvant dans une situation identique ou similaire. Après tout, le fait de ne pas être dans une situation similaire démontre précisément que des mesures apparemment neutres n'affectent pas tous les travailleurs de la même manière. Le groupe de comparateurs n'est donc pas tenu à cette restriction mais doit plutôt inclure tous ceux qui sont touchés par la mesure, le critère ou la pratique contesté. Dans les cas portant sur l'égalité de rémunération, toutefois, tous les comparateurs doivent prester un travail de valeur égale.

Deuxièmement, si la CJUE a admis le principe du *pro-rata temporis* pour ce qui concerne la rémunération en fonction des heures prestées, il ne s'agit pas toujours d'un moyen adéquat d'évaluer le traitement et le salaire de travailleurs ayant des contrats d'emploi différents. Ainsi par exemple, des mesures compensatoires devraient pouvoir être intégralement octroyées, et l'ancienneté ne peut être réduite pour simple cause de travail à temps partiel. Le rapport montre en outre qu'une évaluation substantielle plutôt que formelle du traitement, tenant compte des implications plus larges des mesures, critères et pratiques, permet de mieux reconnaître et gérer des désavantages systémiques fondés sur le genre.

Troisièmement, si la CJUE a défendu le principe de la source unique, à savoir l'exigence qu'il existe une entité qui soit à la fois responsable de l'inégalité de traitement et capable de rétablir l'égalité, elle ne la limite pas pour autant à un seul employeur. Des conventions collectives, des actes législatifs et même des structures d'entreprise peu rigides incluant des filiales peuvent constituer cette source unique et toutes les personnes ainsi concernées peuvent être incluses dans la comparaison.

Quatrièmement, si la plus grande partie de la jurisprudence de la CJUE et des juridictions nationales porte sur des «désavantages particuliers» démontrés par référence à des données statistiques, les directives en matière d'égalité ainsi que la jurisprudence de la CJUE ont également admis le raisonnement qualitatif. Il en résulte que des données statistiques ne sont pas toujours exigées lorsqu'elles s'avèrent difficiles à obtenir, et qu'il est possible de procéder à une évaluation qualitative de la substance de la mesure en prenant en compte son impact sur différents groupes au sein de la société. Les statistiques n'en demeurent pas moins utiles car elles laissent les faits parler d'eux-mêmes sans devoir pousser plus loin l'examen des raisons à l'origine des désavantages constatés et des personnes qui en sont affectées. Plus précisément, il n'est pas nécessaire d'expliquer pourquoi un désavantage survient pour autant qu'il soit statistiquement démontré.

Enfin, l'interprétation de la justification objective est stricte pour ce qui concerne le caractère approprié et nécessaire. Il ne suffit pas, dès lors, de démontrer que la mesure réalise effectivement le but légitime poursuivi. Au contraire, s'il existe d'autres mesures, moins discriminatoires, de réaliser ce but, la mesure choisie ne pourra être considérée comme nécessaire et il n'y aura donc pas de justification objective. Le champ d'application de cette justification est par ailleurs limité dans la mesure où elle tient uniquement compte du but légitime et des mesures prises pour le réaliser.

Il faudrait, pour que l'interdiction de discrimination indirecte fondée sur le sexe couvre les inégalités systémiques de façon plus globale, accorder davantage d'attention à une série d'aspects ainsi qu'aux recours possibles, comme le montre le chapitre 5.

Premièrement, il convient de procéder à une étude plus approfondie de la manière dont le raisonnement qualitatif, plutôt que la preuve statistique, peut servir à démontrer un désavantage particulier, la combinaison de preuves statistiques et d'arguments qualitatifs apparaissant comme l'approche commune la plus courante lorsque des juridictions procèdent à un raisonnement qualitatif. Ce dernier peut s'avérer particulièrement utile lorsque les données statistiques sont insuffisantes ou lorsqu'elles ne sont pas significatives en raison du petit nombre de travailleurs inclus dans la comparaison. Il convient toutefois de veiller également à éviter le renforcement de stéréotypes liés au genre.

Deuxièmement, il y a lieu de faire une analyse plus poussée de la protection éventuelle d'hommes ayant des rôles «typiquement» associés au genre féminin (occupation d'un emploi à temps partiel pour cause de responsabilités de garde et de soins, ou prise d'un congé parental, par exemple) dans la perspective du champ d'application du droit relatif à la discrimination indirecte fondée sur le sexe. Il se pourrait que ces hommes vivent une expérience analogue à celle des femmes dans la même situation, mais que l'on estime qu'ils ne peuvent invoquer une discrimination indirecte fondée sur le sexe du fait que les hommes ne sont pas défavorisés en tant que groupe. Toutefois, à partir du moment où le désavantage est évalué de manière objective et distincte de la partie requérante concernée, le fait que celle-ci soit un

homme devrait être non pertinent si elle subit le même désavantage que le groupe défavorisé. Certaines juridictions nationales ont effectivement adopté ce point de vue.

Troisièmement, l'interdiction de discrimination indirecte fondée sur le sexe peut s'avérer particulièrement précieuse pour aborder des désavantages intersectionnels liés à plusieurs caractéristiques protégées. Étant donné que le droit relatif à la discrimination indirecte fondée sur le sexe ne requiert pas que toutes les femmes soient défavorisées, mais qu'il se focalise plutôt sur les charges disproportionnées, il peut prendre en compte les désavantages subis par des sous-groupes de femmes se trouvant dans une situation particulière. C'est ainsi par exemple que la CJUE a reconnu des désavantages subis par des femmes âgées et que plusieurs juridictions nationales ont pris en compte la situation de mères célibataires ou de femmes appartenant à des minorités religieuses (en rapport avec l'interdiction du port du voile).

Enfin, il est important de noter que le droit relatif à la discrimination indirecte fondée sur le sexe peut imposer des obligations comparables à ce qui existe en matière d'aménagement raisonnable, bien que ces obligations ne soient pas axées sur des besoins individuels mais tendent plutôt à requérir des changements structurels. Un raisonnement qualitatif prenant en compte une évaluation substantive des mesures parallèlement à des données statistiques pourrait s'avérer particulièrement utile dans ce contexte.

Le chapitre 6 se penche sur la pertinence de la discrimination indirecte fondée sur le sexe sur les marchés actuels de l'emploi. Il s'intéresse notamment aux nouvelles formes de travail susceptibles de poser des problèmes particuliers pour l'application du droit relatif à la discrimination indirecte fondée sur le sexe tout en perpétuant les problèmes posés par les formes les plus courantes de ce type de discrimination – la lutte contre la discrimination fondée sur le travail à temps partiel et le congé parental étant ici de longue date l'objectif principal. Or la discrimination persiste dans ces deux domaines, sans compter qu'une focalisation sur les désavantages comparatifs ne permet pas de remédier à la totalité des effets préjudiciables découlant à long terme de ces modalités de travail. Ainsi par exemple, l'égalité de rémunération des travailleurs à temps plein et à temps partiel sur une base *pro-rata temporis* n'est pas en soi une solution pour remédier à l'écart de rémunération et de pension, étant donné que le revenu global des travailleurs à temps partiel sera toujours inférieur à celui des travailleurs à temps plein, ce qui a également des répercussions sur l'écart de pension. De surcroît, les taux de travail à temps partiel varient considérablement selon les Etats membres, et l'abondante jurisprudence relative à la discrimination liée au travail à temps partiel peut dès lors être considérée comme moins pertinente dans certains d'entre eux. Le congé parental continue lui aussi de comporter des désavantages du fait que les travailleurs perdent de leur salaire et éprouvent souvent beaucoup de difficulté à retrouver leur ancienne position. Les modalités en matière de congé parental varient elles aussi fortement d'un Etat membre à l'autre et il n'est pas toujours facile, au niveau national, d'établir la distinction entre congé de maternité, congé de paternité et congé parental.

Enfin, l'approche actuelle de la discrimination indirecte fondée sur le sexe pourrait se heurter à des difficultés face à certaines modalités qui, en vigueur sur les marchés modernes du travail, se caractérisent par une flexibilité en termes de durée, d'horaire et de lieu de travail et par l'inclusion de nombreux travailleurs quasi-indépendants (à savoir ceux qui travaillent dans le cadre de l'économie à la tâche (*gig economy*) ou sur des plateformes). Les difficultés résident dans l'éventuelle absence de source unique susceptible de remédier au désavantage sur un marché du travail marqué par la ségrégation; ou, en ce qui concerne les travailleurs quasi-indépendants, dans la recherche de solutions à des désavantages ancrés au cœur même des dispositions contractuelles (lorsque l'absence de salaire minimum est contestée dans le cadre d'un contrat zéro heure/sur demande, par exemple); ou encore dans la manière dont des algorithmes et les rémunérations basées sur des retours (*feedback*) perpétuent les préjugés sexistes. Par ailleurs, les modalités flexibles de travail à distance pourraient permettre la coordination entre responsabilités familiales et professionnelles, mais cette possibilité dépendra en réalité de la conception même de ces nouvelles flexibilités et de leur capacité de prendre en compte les besoins des travailleurs.

Pour conserver tout son sens dans le cadre de ces nouveaux arrangements de travail en rupture avec la relation classique employeur-salarié, le droit relatif à la discrimination indirecte fondée sur le sexe doit prévoir un examen plus systématique des désavantages particuliers en se référant à une analyse sectorielle. Un raisonnement qualitatif envisageant les désavantages de manière systématique plutôt que strictement statistique apparaît, à cet égard, comme l'approche la plus judicieuse.

Le rapport suggère deux stratégies en vue de relever ces anciens et nouveaux défis liés à l'application du droit en matière de discrimination indirecte fondée sur le sexe sur le marché actuel du travail. La première se concentre sur la clarification du concept en vue d'en encourager et d'en intensifier la bonne application au niveau national. Face à la grande diversité des approches nationales quant à cette application, et à la compréhension souvent insuffisante du concept même de discrimination indirecte fondée sur le sexe, de son champ d'application et de son potentiel, il va s'avérer indispensable d'élaborer des orientations pratiques précises, y compris de nombreux exemples, à l'intention des juridictions nationales et d'éventuels requérants, groupes d'intérêts et organismes de promotion de l'égalité. La seconde stratégie est axée pour sa part sur la capacité du concept de remettre en question des désavantages systémiques sur un marché du travail caractérisé aujourd'hui par la ségrégation et la fragmentation. Elle propose plus spécifiquement une mise en lumière des «désavantages particuliers» par rapport aux désavantages systémiques basés sur le sexe observés à l'échelle d'un secteur, afin de dépasser certaines limites imposées par l'exigence de la source unique, le cadre de référence et l'accent sur les preuves statistiques.

Zusammenfassung

Das Konzept der mittelbaren Diskriminierung aufgrund des Geschlechts richtet sich gegen dem Anschein nach neutrale Vorschriften, Kriterien oder Verfahren, die „Personen des einen Geschlechts in besonderer Weise gegenüber Personen des anderen Geschlechts benachteiligen können, es sei denn, die betreffenden Vorschriften, Kriterien oder Verfahren sind durch ein rechtmäßiges Ziel sachlich gerechtfertigt und die Mittel sind zur Erreichung dieses Ziels angemessen und erforderlich“ (Artikel 2 Abs. 1 Bst. b Richtlinie 2006/54/EG). Der Fokus des Konzepts liegt also auf den Auswirkungen der Maßnahmen: Es erachtet diese Maßnahmen (sofern sie nicht gerechtfertigt sind) als potenziell diskriminierend, wenn sie zu einer besonderen Benachteiligung von Männern oder Frauen führen. Ob ein direkter Bezug zu „Geschlecht“ als geschütztem Merkmal besteht, ist dabei irrelevant. Zudem hat der EuGH die Relevanz des Vorsatzes im Zusammenhang mit mittelbarer und unmittelbarer Diskriminierung aufgrund des Geschlechts schon lange verworfen. Indem das Konzept den Fokus auf die Auswirkungen legt, zielt es darauf ab, systemische oder strukturelle geschlechtsbezogene Benachteiligungen und Schwachstellen aufzudecken, um so einer materiellen Gleichstellung näherzukommen.

Systemische oder strukturelle Ungleichheit zwischen Männern und Frauen bezieht sich auf die in unserer Gesellschaft derzeit herrschenden geschlechtsbezogenen Strukturen, einschließlich Geschlechterrollen und -erwartungen, Geschlechterstereotypen, geschlechtsspezifischen Machtverhältnissen, Abhängigkeiten und mangelnder Anerkennung, die zu erheblichen Benachteiligungen von Frauen führen. Im Bereich der Beschäftigung manifestieren sich diese Benachteiligungen in dem geschlechtsspezifischen Lohn- und Rentengefälle, der sogenannten „Mutterschaftsstrafe“, einem erheblichen geschlechtsspezifischen Ungleichgewicht beim Elternurlaub und bei Teilzeitarbeitsverträgen sowie in der geschlechtsspezifischen Segregation des Arbeitsmarktes mit einer generellen Abwertung „typisch“ weiblicher Arbeit. Diese Benachteiligungen sind leicht zu erkennen. Weitaus schwieriger ist es jedoch, einen einzelnen Schuldigen oder eine einzelne Handlung zu identifizieren, der bzw. die als Ursache für die Benachteiligung verantwortlich gemacht oder geändert werden könnte. Meist ist die Situation das Ergebnis einer Verstrickung von Benachteiligungen und mittelbar oder unmittelbar diskriminierenden Handlungen, die die Chancen, die Wettbewerbsfähigkeit und die Anerkennung von Frauen einschränken und sie sowohl im öffentlichen als auch im privaten Bereich besonders verletzlich machen. Damit das Gleichbehandlungsrecht die materielle Gleichstellung von Männern und Frauen fördert, muss es diese strukturellen Benachteiligungen anerkennen, um die Chancen, die Sichtbarkeit und den Schutz von Frauen zu verbessern.

Die Anerkennung mittelbarer Diskriminierung aufgrund des Geschlechts ermöglicht es, gegen einige der strukturellen Ungleichheiten zwischen den Geschlechtern vorzugehen, indem Maßnahmen aufgedeckt werden, die sich zwar nicht unmittelbar auf das Geschlecht beziehen, Frauen aber dennoch stärker benachteiligen als Männer. Der EuGH hat sich mit diesen Benachteiligungen vor allem im Zusammenhang mit Teilzeitarbeit und Elternurlaub befasst. Da Frauen viel häufiger in Teilzeit arbeiten und/oder Elternurlaub nehmen, sind sie von jeder Benachteiligung, die eine dieser Situationen mit sich bringt, überproportional betroffen. Maßnahmen, Kriterien und Verfahren, die eine solche Benachteiligung hervorbringen, müssen daher durch Faktoren gerechtfertigt sein, die nichts mit geschlechtsbezogener Diskriminierung zu tun haben. Insbesondere müssen sie „einem wirklichen Bedürfnis des Unternehmens dienen und für die Erreichung dieses Ziels geeignet und erforderlich [sein]“ (Bilka). In *Roks*, *Steinicke* sowie *Hill und Stapleton* wies der EuGH darauf hin, dass Haushalts- und Kostenerwägungen sozialpolitische Entscheidungen und den Umfang der sozialen Schutzmaßnahmen beeinflussen könnten; sie „stellten jedoch als solche kein mit dieser Politik verfolgtes Ziel dar und könnten daher eine Diskriminierung eines der Geschlechter nicht rechtfertigen“. Andernfalls würde die Anwendung des Gleichheitsgrundsatzes von der wirtschaftlichen Lage des jeweiligen Mitgliedstaates oder Unternehmens abhängen. Finanzielle Schwierigkeiten oder Einschränkungen sollten also gleichmäßig zwischen beiden Geschlechtern aufgeteilt werden.

Das Konzept der mittelbaren Diskriminierung aufgrund des Geschlechts beschränkt sich überdies nicht darauf, Maßnahmen in Frage zu stellen, die Frauen aufgrund fortdauernder geschlechtsspezifischer Rollen und Arbeitsteilungen in den Mitgliedstaaten ganz offensichtlich benachteiligen. Vielmehr kann es allein durch seine Fokussierung auf ungleiche Auswirkungen vielfältige Benachteiligungen aufdecken, die alles andere als offensichtlich sind. Beispielsweise ist es möglich, gegen berufliche Beförderungsregelungen oder Eignungsprüfungen, die Frauen systematisch benachteiligen, wegen mittelbarer Diskriminierung aufgrund des Geschlechts vorzugehen, auch wenn nicht immer klar ist, warum die betreffenden Regelungen und Prüfverfahren Benachteiligungen verursachen. So können unbewusste geschlechtsspezifische Voreingenommenheiten in Beförderungs- und Einstellungsverfahren aufgedeckt werden, die keineswegs offensichtlich sind, aber dennoch die Chancen von Frauen beschneiden.

Das Konzept der mittelbaren Diskriminierung aufgrund des Geschlechts kann somit ein wirksames Instrument sein, um bestehende geschlechtsspezifische Schwachstellen aufzudecken und gegen damit verbundene Benachteiligungen vorzugehen. Sein symmetrischer Charakter, der sich allein auf komparative Benachteiligung konzentriert, reicht jedoch nicht aus, um eine materielle Gleichstellung von Frauen und Männern, geschweige denn Gleichstellung im weiteren Sinne zu gewährleisten. Das Konzept hindert verantwortliche Stellen (Sozialpartner, Arbeitgeber, Gesetzgeber usw.) daran, bestehende Ungleichheiten auszunutzen, erlegt aber keine Pflicht zur Gewährleistung materieller Gleichstellung auf. Sobald eine Maßnahme gerechtfertigt ist, bleibt sie so, wie sie ist, und somit besteht die Benachteiligung weiter.

Angesichts dieser anhaltenden systemischen Ungleichbehandlung von Frauen und Männern in den Mitgliedstaaten sollte das Konzept der mittelbaren Diskriminierung aufgrund des Geschlechts im nationalen Rechtsdiskurs über Geschlechterdiskriminierung im Vordergrund stehen. Schließlich sind Benachteiligungen, die sich aus der systemischen Ungleichbehandlung von Frauen und Männern ergeben, weit verbreitet, und das Verbot der mittelbaren Diskriminierung aufgrund des Geschlechts scheint ein weitaus wirksamerer Ansatz zu sein, um gegen diese Benachteiligungen vorzugehen – wobei unmittelbare Diskriminierung aufgrund des Geschlechts sich durchaus auch gegen strukturelle Benachteiligungen richten kann, beispielsweise im Zusammenhang mit der Diskriminierung von Schwangeren oder Unterschieden im Rentenalter von Männern und Frauen. Die nationale Rechtsprechung, die sich mit mittelbarer Diskriminierung aufgrund des Geschlechts beschäftigt, ist jedoch spärlich und konzentriert sich zumeist auf die offensichtlichsten Formen dieser Art von Diskriminierung, etwa Diskriminierungen im Zusammenhang mit Teilzeitarbeit oder Elternurlaub. Abgesehen von solchen Fällen wird das Konzept oft unzureichend verstanden und ungenau angewandt, ohne Berücksichtigung des zweigleisigen Ansatzes, der verlangt, dass die beschwerdeführende Partei auf der Grundlage der jeweiligen besonderen Benachteiligung das Vorliegen einer mittelbaren Diskriminierung aufgrund des Geschlechts glaubhaft macht und die beschwerte Partei sachliche Gründe vorbringt, die sehr streng zu bewerten sind.

Mittelbare Diskriminierung aufgrund des Geschlechts konzentriert sich auf komparative Benachteiligungen. Kapitel 4 erörtert eingehend die verschiedenen Aspekte, die die vergleichende Analyse umfasst, und zeigt, wie diese vom EuGH und den nationalen Gerichten aufgegriffen wurden. Mittelbare Diskriminierung aufgrund des Geschlechts konzentriert sich auf die Auswirkungen, die Maßnahmen auf verschiedene Geschlechtsgruppen haben. Mit anderen Worten: Es wird geprüft, ob die betreffende Maßnahme eine Geschlechtsgruppe gegenüber der anderen eher benachteiligt oder begünstigt und somit für eine der beiden Gruppen eine komparative Benachteiligung darstellt. Dazu ist es erforderlich, einen Nachteil, eine Gruppe von Vergleichspersonen und eine unverhältnismäßige Belastung zu bestimmen. Im Zusammenhang mit diesem Bezugsrahmen sind einige spezifische Aspekte zu beachten.

Erstens ist es für mittelbare Diskriminierung aufgrund des Geschlechts nicht erforderlich, nur Beschäftigte zu vergleichen, die sich in derselben oder einer ähnlichen Situation befinden. Schließlich ist die Tatsache, dass sich die Beschäftigten nicht in einer ähnlichen Situation befinden, der Grund, warum scheinbar neutrale Maßnahmen sie auf unterschiedliche Weise betreffen. Die Vergleichsgruppe ist also nicht auf diesen Kreis beschränkt, sondern sollte alle Personen umfassen, die von den beanstandeten Maßnahmen,

Kriterien oder Verfahren betroffen sind. In Fällen, in denen es um Entgeltgleichheit geht, müssen jedoch alle Vergleichspersonen gleichwertige Arbeit verrichten.

Zweitens hat der EuGH zwar den Pro-rata-temporis-Grundsatz hinsichtlich einer Vergütung nach geleisteten Arbeitsstunden akzeptiert, doch ist dieser nicht immer ein adäquates Mittel, um die Behandlung und Vergütung von Beschäftigten mit unterschiedlichen Arbeitsverträgen zu beurteilen. Zum Beispiel müssen Ausgleichsmaßnahmen möglicherweise in vollem Umfang gewährt werden, und die Dauer der Betriebszugehörigkeit kann nicht einfach wegen Teilzeitarbeit reduziert werden. Außerdem weist der Bericht darauf hin, dass eine inhaltliche Bewertung der Behandlung, die die weitreichenderen Auswirkungen von Maßnahmen, Kriterien und Verfahren berücksichtigt, besser als eine formale Bewertung geeignet ist, systemische Benachteiligungen aufgrund des Geschlechts zu erkennen und gegen diese vorzugehen.

Drittens hat der EuGH zwar den Grundsatz der „einzigen Quelle" bestätigt, dem zufolge es eine Stelle geben muss, die sowohl für die Ungleichbehandlung verantwortlich als auch in der Lage ist, die Gleichbehandlung wieder herzustellen, doch beschränkt sich dieser nicht auf einen einzigen Arbeitgeber. Tarifverträge, Rechtsvorschriften und sogar lose Unternehmensstrukturen einschließlich Tochtergesellschaften können eine solche einzige Quelle darstellen, und somit können alle, die von diesen Dingen betroffen sind, in den Vergleich einbezogen werden.

Viertens: Während der Großteil der Rechtsprechung des EuGH und der nationalen Gerichte sich auf „besondere Benachteiligungen" konzentriert, die anhand statistischer Daten nachgewiesen werden, haben die Gleichbehandlungsrichtlinien sowie die Rechtsprechung des EuGH auch qualitative Argumente zugelassen. Demzufolge sind statistische Daten nicht immer erforderlich, wenn sie nicht unmittelbar verfügbar sind, und ist es möglich, das Wesen der betreffenden Maßnahme unter Berücksichtigung ihrer potenziellen Auswirkungen auf verschiedene gesellschaftliche Gruppen qualitativ zu bewerten. Statistiken bleiben jedoch nützlich, weil sie die Fakten für sich selbst sprechen lassen, ohne dass weiter untersucht werden muss, warum diese Benachteiligungen auftreten und wer davon betroffen ist. Insbesondere ist es nicht notwendig zu erklären, warum eine Benachteiligung auftritt, wenn sie statistisch belegt ist.

Schließlich ist die Auslegung der sachlichen Rechtfertigung, was ihre Angemessenheit und Erforderlichkeit betrifft, streng. Es reicht daher nicht aus nachzuweisen, dass die Maßnahme das verfolgte rechtmäßige Ziel tatsächlich erreicht. Wenn es im Gegenteil andere, weniger diskriminierende Maßnahmen gibt, um das Ziel zu erreichen, kann die gewählte Maßnahme nicht als notwendig angesehen werden, so dass keine sachliche Rechtfertigung vorliegt. Die sachliche Rechtfertigung ist auch in ihrem Umfang begrenzt, da sie nur das rechtmäßige Ziel und die Maßnahmen zur Erreichung dieses Ziels berücksichtigt.

Damit das Verbot der mittelbaren Diskriminierung aufgrund des Geschlechts umfassender auf systemische Ungleichheiten reagieren kann, verdienen einige Aspekten und mögliche Abhilfemaßnahmen besondere Aufmerksamkeit. Dies Punkte werden in Kapitel 5 erörtert.

Erstens ist es notwendig, genauer zu untersuchen, wie qualitative Argumente anstelle von statistischen Beweisen verwendet werden können, um besondere Benachteiligungen zu belegen, da eine Kombination aus statistischen Beweisen und qualitativen Argumenten der häufigste Ansatz zu sein scheint, wenn Gerichte sich auf eine qualitative Argumentation einlassen. Letztere kann insbesondere dann von Nutzen sein, wenn die statistischen Daten unzureichend oder aufgrund der geringen Anzahl der in den Vergleich einbezogenen Beschäftigten nicht aussagekräftig sind. Es sollte jedoch auch darauf geachtet werden, die Verstärkung von Geschlechterstereotypen zu vermeiden.

Zweitens sollte der eventuelle Schutz von Männern in „typisch" weiblichen Geschlechterrollen (z. B. Ausübung einer Teilzeitarbeit wegen Betreuungspflichten oder Inanspruchnahme von Elternurlaub) im Rahmen der Rechtsvorschriften zu mittelbarer Diskriminierung aufgrund des Geschlechts genauer untersucht werden. Die individuellen Erfahrungen dieser Männer mögen denen von Frauen in der gleichen Situation ähneln,

und doch ließe sich sagen, dass sie keine mittelbare Diskriminierung aufgrund des Geschlechts geltend machen können, weil Männer als Gruppe nicht benachteiligt werden. Wenn die Benachteiligung jedoch objektiv und unabhängig von der beschwerdeführenden Partei festgestellt wird, sollte es keine Rolle spielen, dass der Beschwerdeführer ein Mann ist, wenn er die gleiche Benachteiligung erleidet wie die benachteiligte Gruppe. Einige nationale Gerichte haben sich diese Sichtweise in der Tat zu eigen gemacht.

Drittens kann das Verbot der mittelbaren Diskriminierung aufgrund des Geschlechts von großem Nutzen sein, wenn es darum geht, gegen intersektionelle Benachteiligungen vorzugehen, die mehr als ein geschütztes Merkmal betreffen. Da die Rechtsvorschriften zu mittelbarer Diskriminierung aufgrund des Geschlechts nicht verlangen, dass alle Frauen benachteiligt sind, sondern sich auf unverhältnismäßige Belastungen konzentrieren, können sie auf Benachteiligungen reagieren, die Untergruppen von Frauen betreffen, die sich in einer bestimmten Situation befinden. Der EuGH hat beispielsweise die Benachteiligung älterer Frauen anerkannt, und mehrere nationale Gerichte haben sich mit der speziellen Situation von alleinerziehenden Müttern oder von Frauen befasst, die religiösen Minderheiten angehören (im Zusammenhang mit dem Verbot des Tragens eines Kopftuchs).

Schließlich ist es wichtig zu beachten, dass die Rechtsvorschriften zu mittelbarer Diskriminierung aufgrund des Geschlechts Pflichten auferlegen können, die den Pflichten zum Treffen angemessener Vorkehrungen ähneln. In diesem Fall sind die Pflichten jedoch nicht auf individuelle Bedürfnisse ausgerichtet, sondern auf das Erfordernis struktureller Änderungen. Eine qualitative Argumentation, die neben statistischen Daten auch eine inhaltliche Bewertung von Maßnahmen umfasst, könnte in diesem Zusammenhang besonders hilfreich sein.

Kapitel 6 befasst sich mit der Relevanz der Rechtsvorschriften zu mittelbarer Diskriminierung aufgrund des Geschlechts für die heutigen Arbeitsmärkte. Dabei geht es auch um neue Arbeitsformen, die für die Anwendung dieser Rechtsvorschriften besonders herausfordernd sein können und die Probleme der häufigsten Formen mittelbarer Geschlechterdiskriminierung aufrechterhalten, wobei die Bekämpfung der Diskriminierung wegen Teilzeitarbeit und Elternurlaub hier seit langem im Mittelpunkt steht. Dennoch gibt es in diesen beiden Bereichen nach wie vor Diskriminierung. Außerdem ist der Fokus auf komparative Benachteiligung nicht in der Lage, alle nachteiligen Auswirkungen zu berücksichtigen, die langfristige Folgen dieser Arbeitsverhältnisse sind. Zum Beispiel wird die zeitanteilige Gleichbezahlung von Vollzeit- und Teilzeitbeschäftigten an sich das Problem des Lohn- und Rentengefälles nicht lösen, da das Gesamteinkommen von Teilzeitbeschäftigten immer niedriger sein wird als das von Vollzeitbeschäftigten, was dann auch Auswirkungen auf das Rentengefälle hat. Zudem variiert der Anteil der Teilzeitarbeit in den einzelnen Mitgliedstaaten erheblich. Die umfangreiche Rechtsprechung zu Diskriminierung im Zusammenhang mit Teilzeitarbeit kann daher in einigen Mitgliedstaaten als weniger relevant angesehen werden. Auch Elternurlaub bringt nach wie vor Nachteile mit sich, da die Beschäftigten Lohneinbußen hinnehmen müssen und oft Schwierigkeiten haben, an ihren früheren Arbeitsplatz zurückzukehren. Auch die Regelungen für den Elternurlaub sind von Mitgliedstaat zu Mitgliedstaat sehr unterschiedlich, und auf nationaler Ebene ist es nicht immer einfach, zwischen Mutterschafts-, Vaterschafts- und Elternurlaub zu unterscheiden.

Schließlich könnte es für das derzeitige Verständnis von mittelbarer Diskriminierung aufgrund des Geschlechts schwierig werden, mit modernen Arbeitsmarktregelungen umzugehen, die sich durch Flexibilität in Bezug auf Arbeitszeit, -stunden und -ort auszeichnen und viele quasi-selbstständige Beschäftigte erfassen (z. B. diejenigen, die in der Gig Economy oder ihre Arbeit auf digitalen Plattformen anbieten). Die Schwierigkeiten liegen im möglichen Fehlen einer einzigen Quelle, die den Benachteiligungen in einem segregierten Arbeitsmarkt abhelfen kann, oder, im Fall von quasi-selbstständigen Beschäftigten, darin, gegen Benachteiligungen vorzugehen, die den Kern der vertraglichen Vereinbarungen betreffen (z. B. wenn das Fehlen einer Mindestvergütung in einem Null-Stunden-/Abruf-Arbeitsvertrag beanstandet wird), oder auch darin, wie Algorithmen und eine rückkopplungsbasierte Vergütung geschlechtsspezifische Verzerrungseffekte verewigen. Flexible Telearbeitsmodelle könnten darüber hinaus die Vereinbarung von familiären und beruflichen Pflichten ermöglichen; in der Realität hängt diese Möglichkeit aber davon

ab, wie die neuen Flexibilitätsregelungen konzipiert sind und ob sie die Bedürfnisse der Beschäftigten berücksichtigen. Um im Zusammenhang mit diesen neuen Arbeitsformen, die mit dem traditionellen Arbeitgeber-Arbeitnehmer-Verhältnis brechen, weiterhin Sinn zu machen, müssen die Rechtsvorschriften zu mittelbarer Diskriminierung aufgrund des Geschlechts besondere Benachteiligungen unter Bezugnahme auf branchenspezifische Untersuchungen systemischer analysieren. Eine qualitative Argumentation, die Benachteiligungen nicht rein statistisch, sondern systemisch betrachtet, scheint diesbezüglich der hilfreichste Ansatz zu sein.

Der Bericht schlägt zwei Strategien vor, um diesen alten und neuen Herausforderungen bei der Anwendung der Rechtsvorschriften zu mittelbarer Diskriminierung aufgrund des Geschlechts auf den aktuellen Arbeitsmarkt zu begegnen. Die erste Strategie legt den Fokus auf die Klärung des Konzepts mit dem Ziel, seine korrekte Anwendung auf nationaler Ebene zu fördern und zu verbessern. Da die nationalen Ansätze zur Anwendung dieser Rechtsvorschriften sehr unterschiedlich sind und häufig ein unzureichendes Verständnis des Konzepts, seines Anwendungsbereichs und Potenzials erkennen lassen, erfordert dies die Entwicklung detaillierter, praktischer Leitlinien, einschließlich zahlreicher Beispiele, für nationale Gerichte sowie für potenzielle Kläger, Interessengruppen und Gleichbehandlungsstellen. Die zweite Strategie legt den Fokus auf die Fähigkeit des Konzepts, systemische Benachteiligungen innerhalb des heutigen segregierten und fragmentierten Arbeitsmarktes zu bekämpfen. Konkret wird vorgeschlagen, die „besonderen Benachteiligungen“ durch Klärung systemischer, branchenweiter geschlechtsspezifischer Benachteiligungen ans Licht zu bringen, um einige der Beschränkungen zu überwinden, die sich aus dem Erfordernis der einzigen Quelle, dem Bezugsrahmen und der Betonung statistischer Nachweise ergeben.

1 Introduction

Indirect discrimination recognises the potentially detrimental effect of measures that do not refer to protected characteristics but nevertheless disadvantage groups with protected characteristics. Accordingly, EU non-discrimination law goes beyond simply prohibiting the differential treatment directly based on the protected characteristics and invites an effects-based analysis. It recognises that formally equal treatment, irrespective of the protected characteristics, can have detrimental effects on disadvantaged groups within societies that are shaped by past discrimination, unequal opportunities and structural inequalities (including specific employment features such as part-time work). Within the context of this report, we will analyse the scope and functioning of the concept of indirect sex discrimination with a focus on employment. Given that EU non-discrimination law originated within the context of sex discrimination in employment, this area of EU non-discrimination law is the most developed and national courts should have significant experience with indirect sex discrimination in employment. These developments are relevant for the entire application of the concept of indirect discrimination, irrespective of protected ground.

The concept of indirect discrimination first gained prominence within the US in the context of high-school diploma requirements for unskilled jobs that disadvantaged African Americans, as they were less likely to have a high school diploma due to the educational disadvantages and segregation experienced by the African American community.[1] At the European level, the CJEU first picked up the idea of indirect discrimination within the context of nationality and sex discrimination.[2] Regarding the latter, it considered early on the less beneficial treatment of part-time workers under the scope of indirect sex discrimination (*Jenkins* 96/80; *Bilka* 170/84) and much of its case law still focuses on that. As most part-time workers are female (although the percentage varies by Member State), discrimination against part-time workers is usually a *prima facie* case of indirect sex discrimination.[3] Similarly, disadvantages arising from career breaks due to childcare are far more likely to affect women than men, as women are more likely to take the childcare leave offered to them.

However, indirect sex discrimination can also challenge the use of criteria that have a less obvious detrimental effect on the protected ground. The current definition of indirect sex discrimination in Article 2(1)(b) Directive 2006/54/EC clarifies this. Accordingly, indirect discrimination addresses situations 'where 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'. As such, indirect discrimination is broadly conceived, as the definition includes hypothetical situations and has abandoned the need for a disproportional disadvantage. It then seems possible to expose a 'particular disadvantage' with reference to statistical evidence as well as substantive or qualitative reasoning. Challenging indirect sex discrimination can prevent the circumvention of the ban on direct sex discrimination but may also foster significant structural changes (social engineering) as it is context sensitive, exposes de facto disadvantages and imposes duties of recognition. For example, indirect discrimination requires employers to recognise that employees may face different challenges in complying with flexible work requirements, shift work or overtime due to domestic responsibilities. While this does not create a duty of reasonable accommodation on an individual basis, indirect discrimination goes beyond the scope of formal equality, as employers may have to reconsider their workplace organisation to prevent disproportional disadvantages. While not all social inequalities are directly challenged, as indirect discrimination does not impose duties to organise the broader social and domestic environment in an equal manner (e.g. regarding gender

1 *Griggs* v *Duke Power Co.* 1971.

2 Judgment of 12 February 1974, *Sotgiu* v *Deutsche Bundespost,* C-152/73,ECLI:EU:C:1974:13. For a general discussion of the concept of indirect discrimination see Tobler, C. (2008) *Limits and potential of the concept of indirect discrimination* (European Commission, European network of legal experts in gender equality and non-discrimination).

3 Burri, S.D., and Aune, H. (2013), *Sex Discrimination in Relation to Part-Time and Fixed-Term Work* (European Commission, European network of legal experts in gender equality and non-discrimination) available at: https://www.equalitylaw.eu/downloads/2804-sex-discrimination-en.

roles or childcare responsibilities), it prevents employers from exploiting existing vulnerabilities that are the consequence of these social inequalities. Indirect discrimination thus can prevent compounding disadvantages. For example, as long as the gender pay gap as well as gender roles induce women to accept most of the domestic responsibilities including childcare, they are more likely to work part time and less likely to be available outside normal hours of work. The difference then makes them specifically vulnerable within the employment environment, which presumes an employee to be a domestically well-supported full-time worker. However, employers may not draw distinction between different employee statuses, unless they can justify their actions. This justification test is a strict one, especially the necessity test. Thus, while indirect discrimination falls short of imposing positive duties upon employers and thus cannot ensure substantive gender equality on its own, it can uncover and remedy vulnerabilities that stem from structural inequality, unequal opportunities and group disadvantages.

The present report draws on the answers provided in questionnaires given to 31 national legal gender experts of the European Equality Law Network (27 EU Member States plus Iceland, Liechtenstein, Norway and the United Kingdom).[4] It focuses on indirect sex discrimination law within employment. This includes issues of gender but excludes discrimination on the ground of sexual orientation according to the distinction upheld by the CJEU. 'Employment' will be understood as covered by Directive 2006/54/EC. As such, Directive 2006/54/EC covers access to (self)employment or to occupation including recruitment, promotion, vocational training including retraining and practical work experience, membership of and involvement in organisations of workers or employers and any organisations the members of which carry out a particular profession, working conditions including dismissal and pay, and occupational social security schemes. The report will pay specific attention to disadvantages stemming from part-time work and parental leave, as well as forms of indirect discrimination that may ensue from modern workplace arrangements, the gig economy and the liberalisation of the employment market, since these have potentially created new forms of vulnerability for certain categories of workers. There is also some uncertainty regarding the actual workers' (employment) status, falling within the grey area between employment and self-employment. Issues of self-employment (Directive 2010/41/EU), statutory social security (Directive 79/7/EEC) and occupational social security will mainly be considered in relation to such new forms of work and workplace arrangements.

The report seeks to identify current legal practices in the application of the concept of indirect discrimination law within the states covered in this report (EU Member States and EEA States). While the CJEU case law provides a significant amount of guidance on the correct application of the concept of indirect sex discrimination, there are still areas of uncertainty that can be heavily influenced by the particular circumstances of the case and the precise national understanding of the concept's scope and operation. Specifically, the report will identify the (potential) relevance of the concept of indirect sex discrimination in relation to new forms of work such as the gig economy or flexible, atypical employment arrangements. As such, it will lay bare some of the potential tensions within the concept that can be revealed with reference to application and enforcement at national level and differences between the European and the national approaches, including national shortcomings in the light of EU law and national approaches that provide a broader scope of protection.

At the request of the Commission, the report will use this information to serve two underlying objectives. First, the report will draw attention to the many faces of indirect discrimination that women suffer at work within the diverse Member States. Secondly, the report will advance legal reflections in this regard. Specifically, we hope to identify gaps within the legal protection and develop new ideas on how to approach and analyse issues of indirect sex discrimination within employment to ensure that gender inequalities are tackled effectively, and so that indirect sex discrimination can indeed contribute and foster substantive gender equality.

4 The questionnaire is attached to this report, in Annex 1.

To that end, the report will first summarise the scope and forms of structural gender inequality that have been identified within the national reports (2), as these are the forms of inequality that are primarily considered within the scope of indirect sex discrimination law. The report will then provide some of the relevant theories underpinning the EU concept of indirect non-discrimination law with reference to the current structures of gender inequality (3). It will then discuss the current EU legal framework regarding indirect sex discrimination law including the main findings of the CJEU and national responses to it (4). It will then discuss some legal uncertainties that exist within the current framework (5). Finally, it will consider some common themes of indirect discrimination within the Member States, and underexplored areas within the newly emerging forms of employment and self-employment (6). The discussion will reveal both the potential and limits of EU indirect sex discrimination law.

2 Structural gender inequality

Indirect sex discrimination law is a potentially potent tool for recognising and remedying structural gender inequality within the scope of employment. As such it seems reasonable to first identify what we understand by the term and what types of structural gender inequalities have been identified in the national reports as being the most prominent. There is significant (feminist) research discussing the different ways in which women are disadvantaged within the wider socioeconomic environment. Rather than repeating this work or providing a detailed account of the situation in each Member State, this section will pick up on some common themes that have been identified within the national reports and statistical data to highlight the broader context of structural gender inequality that can then create 'particular disadvantages' within the specific material scope covered by EU non-discrimination law. As such, it is only a summary of the main findings as discussed in the reports and will specifically focus on aspects that are more directly related to disadvantages within the market economy, while systemic inequalities relating to political and participatory powers, experiences of sexual violence and harassment, and disadvantages within social policy (including housing, healthcare and education) of course remain important for a comprehensive understanding of the gendered inequality that affects market participation and power.

While most Member States have abolished directly discriminatory rules in the interest of sex-neutrality, structural inequality is deeply rooted in the socioeconomic, cultural and institutional structures of the state, without a specific actor being responsible for them. It is most obvious if we focus on the systemic issues of inequality that are exposed when we consider the different economic, political and cultural power of men and women have within our society. For example, the glass ceiling cannot be explained by specific discriminatory acts committed by specific actors but rather is the consequence of 'patterns of behaviour, policies or practices that are part of the structures of an organization, and which create or perpetuate disadvantage for persons in the workplace.'[5] Similar cultural, social and economic forces exist within the wider society too, systematically disadvantaging women and creating structural barriers that reduce women's economic, political or cultural participation and power. The wider social and economic context then potentially encourages them to make choices that further increase their dependency and inequality. While structural gender inequality can include interactions of direct and indirect sex discrimination that are difficult to capture as they are based on unconscious biases, the initial inequality causing the 'particular disadvantage' often falls outside the field of regulatory control and can be concerned with the ways in which women and men organise their (private) life that may or may not be supported by cultural, socioeconomic and legal structures. Structural inequality thus recognises the interaction of economic, institutional, and cultural inequality and broadens the view of equal treatment as it goes beyond the individual acts of discrimination by focusing on systemic disadvantages. A focus on systemic issues can then advance EU non-discrimination law and make it more responsive to the modern flexible labour market in which there is often no individual actor that can be held responsible for unequal treatment. This seems particularly important within new forms of labour, work and dependency (such as the gig economy) and highly segregated labour markets.[6] For example, the flexibility, afternoon/early evening work, and long working hours often required within the gig economy in many ways reinforces the male norm that assumes a fully free and domestically supported employee. Workers that have to combine care and work responsibilities will often not be sufficiently flexible or work at specific peak hours.

The overall picture of gender equality within Europe remains disappointing. The EIGE Gender Equality Index[7] reports that women on average earn 84 cents for every euro a man makes per hour, resulting in a gender pay gap of 16 %. The subsequent gender pension gap is 35 %. The overall employment rate between the age of 20-64 is 67 % for women and 79 % for men. Moreover, European labour markets

5 Mercat-Bruns, M. (2018) 'Systemic discrimination at work in France and the EU: can antidiscrimination law be transformative?' 2 *Diritti Lavori Mercati,* p. 320.
6 Mercat-Bruns, M. (2018) 'Systemic discrimination: rethinking the tools of gender equality' 2 *European Equality Law Review* 1.
7 European Institute for Gender Equality, Gender Equality Index (2019), 'Money indicators in EU-28' available at: https://eige.europa.eu/gender-equality-index/2019/domain/money.

suffer significantly from segregation along gender lines, with women predominantly working within education, health and social work, while more men are employed in science, technology, engineering and mathematics. Although higher education attainment is relatively equal between men and women, subject segregation similar to that in the labour market can be identified, with women more likely to enrol in courses concerned with education, health and welfare, humanities and arts. Women also spend a significantly larger part of their day on household chores and childcare or other care-related activities, such as educating their children or grandchildren or taking care of elderly people or people with disabilities. Consequently, women and men occupy very different positions regarding work, money, knowledge and responsibilities, which has an effect on their power position within relationships and the wider economy and recognition of their needs. The national reports confirm the general picture of inequality. While the specific degree of inequality varies, all Member States report discrimination against women, especially in relation to pregnancy and parental responsibilities, and structural inequality that compounds inequalities within the labour market.

The **gender pay gap** persists within the EU Member States and is even more serious if we consider the income gap and pension gap. These gaps are causes as well as indicators of structural inequality. As a symptom, they demonstrate that women still suffer pay discrimination. While the calculation of the pay gap is controversial and many adjusted calculations that take into account different career paths and choices indicate smaller gaps, these differences in themselves are indicative of gender inequality. The fact that women are more likely to choose less well-paid careers, work part time and take more career breaks, does not address the systemic and structural inequality that leads women to make these choices and ignores issues such as the unconscious biases that devalue ('typical') female work. There are few objective reasons that explain why 'typical female work' within segregated labour markets are often devalued and low-paid professions with little labour law protection. Unconscious biases can lead to the devaluation of the skills, experience and qualifications of individual women, which then further affects women's pay. For example, several studies have indicated that identical résumés of male and female applicants are rated differently, with men being more likely to receive higher pay offers.[8] Gendered measurements, such as strength requirements, are also unable to explain the difference in valuation. First, it is not obvious why strength, but not other abilities are valued within medium skilled sectors such as care and construction. Secondly, a closer look at the physical requirements often reveal that typical female professions are just as physically demanding as typical male professions.[9]

The gender pay gap then compounds gender inequality, as it encourages a traditional division of labour. Lack of economic power or resources makes women more dependent on their partners and puts them in a vulnerable position when negotiating their independence and equality within the private sphere. In the most innocent way, it simply makes financial sense for the partner with the lower income to take over most of the unpaid domestic labour of care, since reducing that partner's working hours or career progression will have less impact on the financial resources of the household. This logic is also likely to encourage women to take longer periods of paid or unpaid care-related leave or reduce their working time. These factors then further contribute to the income and pension gap between men and women and women's reduced security within the labour market and employment relationships, both of which further increase the power imbalance and dependency within the private and professional spheres. This dependency has real life consequences, as women often experience poverty after divorce or in old age. Lack of public power and influence then further increase the risk for women of ending up in marginalised work arrangements that provide little employment security, as their needs are not recognised by the wider political environment and their employers.

8 Steinpreis, R.E., Anders, K.A. and Ritzke, D. (1999) 'The impact of gender on the review of the curricula vitae of job applicants and tenure candidates', 41(7/8) *Sex Roles* pp. 509-528; Mailfert, A-C. (2018) 'Do you have to change sexes to be a mechanic?' Report by the Foundation for Women with a testing by the Observatory on discrimination of the Sorbonne University, available at: https://fondationdesfemmes.org/wp-content/uploads/2018/11/CP-Testing-DIALEM-3.pdf.

9 See further discussion in section 4.5, below.

Gender stereotypes can be a source of unconscious bias and can thus directly impact women's access to employment, career progression and pay. As such they can be positive or negative but potentially prevent the objective assessment of women's and men's abilities, skills and experiences. Gender stereotypes can also be prescriptive or descriptive.[10] They usually relate to typical feminine traits, behaviour and lifestyle choices and often view women's primary role as being within the private sphere. Consequently, women are not fully recognised as active participants in the public economic sphere or are perceived as the other – they are seen as atypical in that they do not comply with the male standard or norm. Prescriptive stereotypes can amount to serious social external and internal pressure on women to take up specific roles, such as the role of the primary caregivers. This can then increase the descriptive dimension of gender stereotypes as women are indeed more likely to take up care responsibilities, work part time, or take parental leave. While financial pressures may encourage the traditional division of labour, stereotypes are likely to go beyond that. For example, in the **Netherlands**, many women report that they want to work part time and take care of their children or grandchildren, as they view this to be their primary responsibility or enjoyment, leaving it to others within the household to ensure its financial security. In that way, working part time can be perceived as a luxury of financially well-off families, as countries with lower mean incomes often see both parents working full time, despite similar gendered uptake of parental leave and care responsibilities.[11] The prescriptive and descriptive nature of gender stereotypes can then have the effect that women are viewed as less attractive employees and are pushed into work-time reduction or less visible positions to ensure that women's double burden does not create a real or perceived risk for or burden on the employer's organisation of business. This does not mean that part-time work cannot contribute to the overall wellbeing of people in general and women or men with domestic responsibilities specifically.[12] Rather, as long as part-time work is gendered, the professional disadvantages linked to it will mostly affect women, while full-time positions continue to be perceived as a masculine norm. As such, these gender stereotypes also hinder a more comprehensive reassessment of a healthy work-life balance, irrespective of sex.

The **motherhood penalty** also continues to be evident in the Member States.[13] While countries like **Germany** report relatively equal work relations before women have children, their status within the labour market and employment is significantly reduced once they become mothers. There are two interlinked dimensions that can shed light on that effect. First, pregnancy-related maternity leave and subsequent long-term parental leave is often the beginning of a part-time career interrupted by care-related career breaks that influence women's seniority, pay and employment and pension security. Although outside the scope of maternity leave, Member States allow fathers and mothers to access care leave, the legal frameworks often do little to encourage or force fathers to take leave while imposing compulsory leave on mothers.[14] While some compulsory leave can protect women's post-natal health in certain circumstances, it can also reduce their ability to organise their life and care and act freely and equally within the labour market.[15] Long compulsory (maternity) leave is thus problematic if fathers do not face similar obligations. The different approach between maternity and parental leave is thus somewhat contradictory. While the compulsory nature of the former is often considered necessary for the protection of women, the latter's flexible nature is often celebrated as it allows parents to freely organise their family life. As

10 Timmer, A. (2011) 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights' 11(2) *Human Rights Law Review*, pp. 707-738; Timmer, A. (2015) 'Judging Stereotypes' 63(1) *American Journal of Comparative Law* pp. 239-284; Peroni, L. and Timmer, A. (2016) 'Gender Stereotyping in Domestic Violence Cases' in Brems, E. and Timmer, A. (eds.) *Stereotypes and Human Rights Law* (Cambridge Intersentia) pp. 39, 41. See further discussion in sections 3.1 and 3.2, below.

11 Eurostat (2018) 'How common – and how voluntary – is part-time employment?', available at: https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20180608-1.

12 Indeed, some studies suggest the opposite. Van Breeschoten, L. and Evertsson, M. (2018) 'When does part-time work relate to less work-life conflict for parents? Moderating influences of workplace support and gender in the Netherlands, Sweden and the United Kingdom' 22(5) *Community, Work & Family*, pp. 606-628.

13 Kahn, J.R., et. al. (2014) 'The Motherhood Penalty at Midlife' 76(1) *Journal of Marriage and Family* pp. 56-72.

14 Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) OJ L 348, 28.11.1992, pp. 1-7.

15 For a US critique of the EU approach, see Suk, J.C. (2012) 'From Antidiscrimination to Equality: Stereotypes and the Life Cycle in the United States and Europe Evolutions in Antidiscrimination Law in Europe and North America' 60(1) *American Journal of Comparative Law* 75.

such, it does little to break through existing social structures that disadvantage mothers and de facto limit their choices.[16] Depending on the specific legal framework providing for such rights, flexible work arrangements designed to allow parents to balance work and care responsibilities may also have the effect that women are pushed into less attractive working arrangements and face difficulties in returning to full-time employment at a later stage.

However, the motherhood penalty is not only related to observable criteria, such as career breaks, part-time work and seniority. Indeed, many Member States report that women experience significant disadvantages once they return to work after their maternity leave and the motherhood penalty is also visible within countries where fathers commonly take a significant part of the parental leave. As such, it is based not only on objective factors that to some extent come down to different career paths of mothers, but also on broader gender expectations and stereotypes that either assume that mothers will not prioritise their work or because the double burden makes it difficult for them to compete on an equal footing. Women's primary care responsibility may for example mean that they are more often absent from work for short periods of time because of their children's illnesses or other urgent care-related tasks.

The various aspects are very much linked to each other. Stereotypes and unconscious gender biases are the consequence of, but also reinforce, gender inequality. While individual experiences differ depending on the broader socioeconomic environment, there is a clear link between female sex, gender stereotypes, motherhood and reduced competitiveness, without all conditions having to be present for the disadvantage to be experienced. In turn, stereotypes can become self-fulfilling prophesies. For example, a childless women may already suffer disadvantages because of stereotypes linked to motherhood, because there is the (at times empirically demonstrated) assumption that she will focus on childcare in the future, and the devaluation of her contribution at work due to unconscious gender biases will then indeed encourage her to focus her attention on private rather than professional responsibilities.

The accumulation of disadvantages related to motherhood, pay and working time leaves women less protected in the labour market as they often suffer from reduced seniority, pay and job security compared to men, due to career breaks, part-time work and indirect and direct sex discrimination. These disadvantages are then carried over to rights under the scope of statutory social security law and occupational or statutory pensions that are based on contributions and seniority. Moreover, having less secure employment relationships makes women more likely to suffer in times of financial crisis as it is easier to release them from their employment. Additional vulnerabilities can also arise from women accessing work within new economies or professions. While these positions may be less gendered, which enhances accessibility, they may also be less established within the market. The de facto vulnerability of specific positions or employment relationships is complex and depends on the perceived or real necessity of these positions, their sustainability, and the political response to it. For example, while a female workforce predominantly occupied within the public sector generally may enjoy more job security during a financial crisis than men employed within the private employment market, this will not be the case if public services and the general size of the civil service is reduced significantly and/or services are outsourced.[17] Accordingly, male and female unemployment rates following the 2008 financial crisis varied.[18] There is some evidence that the current Covid-related crisis has had a more detrimental impact on women, for example because women are overrepresented in the service sector (including retail, tourism and hospitality), which has

16 Mulder, J. (2018) 'Promoting substantive gender equality through the law on pregnancy discrimination, maternity and parental leave' 1 *European Equality Law Review* 39.

17 Busby, N. (2014) 'Unpaid Care, Paid Work and Austerity: A Research Note' 4(1) *feminist@law* available at: http://journals.kent.ac.uk/index.php/feministsatlaw/article/view/100.

18 Busby, N. (2014) 'Unpaid Care, Paid Work and Austerity: A Research Note' 4(1) *feminist@law*; Eurostat (2009) 'Archive: Impact of the economic crisis on unemployment' available online: https://ec.europa.eu/eurostat/statistics-explained/index.php/Archive:Impact_of_the_economic_crisis_on_unemployment#Gender_differences.

been hit especially hard.[19] However, the worldwide pandemic has not simply highlighted gender inequality related to the segregation of work but has drawn attention to how social inequality affects women's employability and competitiveness. For example, there is clear evidence that the increased childcare needs during long-term lockdown due to closed schools and nurseries and a general requirement to work from home, were largely met by mothers, who then faced significant difficulties in fulfilling their work responsibilities.[20] On the other hand, many of the low-paid jobs within the retail and care industries that are typically occupied by women were hailed as essential industries, which meant that women were required to work significant hours under circumstances with increased health risks.

19 Georgieva, K., Fabrizio, S., Hoon Lim, C. and Tavares, M. (2020) 'The COVID-19 Gender Gap' *IMF Blog* 21 July 2020, available at: https://blogs.imf.org/2020/07/21/the-covid-19-gender-gap/; Landivar, L., Ruppanner, L., Scarborough, W. and Collins, C. (2020) 'Early signs indicate that Covid-19 is exacerbating gender inequality in the labor force' 6 *Socius: Sociological Research for a Dynamic World*, pp. 1-3.

20 Andrew, A., Cattan, S., Costa Dias, M., Farquharson, C., Kraftman, L., Krutikova, S., Phimister, A. and Sevilla, A. (2020) 'The gendered division of paid and domestic work under lockdown', IZA Institute of Labor Economics Discussion Paper No 13500, available at: http://ftp.iza.org/dp13500.pdf.

3 Some theoretical foundations for indirect discrimination law

The theoretical bases for indirect discrimination have been the subject of a controversial academic debate.[21] Despite the vague understanding that it is supposed to foster, support or ensure equality, it does not necessarily provide a solid theoretical foundation. First, the equality principle has often been considered meaningless or empty.[22] Secondly, indirect discrimination law has been deemed unable to ensure an egalitarian society with similar or at least minimum income levels for all. Accordingly, the two concepts should be distinguished. While some commentators retain the link between equality and indirect sex discrimination and may view their separation as pragmatic rather than logical,[23] others have advocated for either a strict or a less strict distinction between both concepts.[24] The following section will map some of the arguments on either side and the alternative or additional theoretical foundations that may help us understand the reach and potential of the concept of indirect sex discrimination. The theoretical foundations exposed in this section are then used to analyse the current scope and potential of indirect sex discrimination, especially within the context of areas of uncertainty (5) and the broader view and current issues within the new economies and labour market (6).

3.1 Substantive or formal equality

The CJEU has repeatedly held that the aim of EU non-discrimination law is to ensure equality in substance, not in form.[25] Accordingly, it has adopted a broad understanding of the scope of sex as a protected characteristic, rejected the need for a comparator in various groups and encouraged a focus on the effect of measures. Indirect sex discrimination is especially relevant with respect to the latter, as it underpins a substantive approach that focuses on outcomes. However, it remains within the symmetric understanding of equal treatment, as it focuses on comparable or equal treatment and does not impose special duties or provide special rights for vulnerable groups. The substantive underpinning of EU non-discrimination law remains somewhat uncertain, as the CJEU does not always distinguish between equal treatment and the general principle of non-discrimination based on sex, with both being primarily approached as symmetrical concepts.[26] It has thus been suggested that Article 23 of the EU Charter imposes a new, broader, asymmetrical, positive duty on EU institutions to ensure gender equality.[27] Substantive equality is a multi-dimensional dynamic concept that invites multiple, diverse and seemingly contradictory and asymmetrical responses to tackle inequalities.[28] Its focus is thus not only on equal treatment alone but on various measures that ensure equal distribution, recognition, participation, and transformation.[29] This suggests that the concept of equality can be understood as a heuristic device that 'generates reasons and arguments'[30] within that context.

21 See, among many, Collins, H. and Khaitan, T. (2018) (eds), *Foundations of Indirect Discrimination Law* (Hart Publishing).
22 Westen, P. (1982) 'The Empty Idea of Equality' *Harvard Law Review* 95(3) p. 537.
23 Fredman, S. (2016) 'Substantive Equality Revisited' *International Journal of Constitutional Law* 14(3) 712; Croon-Gestefeld J. (2017) *Reconceptualising European Equality law: A Comparative Institutional Analysis* (Bloomsbury Hart Publishing) pp. 45-46 highlights that the concepts are often used interchangeably by the CJEU and adopts that approach for her own analysis.
24 Holmes E. (2005) 'Anti-Discrimination Rights Without Equality' *Modern Law Review* 68(2) 175; Schiek, D. (2014) 'Article 23: Equality between women and men' in Peers, S., Hervey, T., Kenner, J. and Ward, A. (eds) *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing).
25 Judgment of 30 April 1998, *Caisse nationale d'assurance vieillesse des travailleurs salariés* v *Thibault*, C-136/95, ECLI :EU:C:1998:178, para 26; judgment of 18 November 2004, *Brandenburg* v *Sass*, C-284/02, ECLI:EU:C:2004:722, para 34.
26 Croon-Gestefeld, J. (2017) *Reconceptualising European Equality Law: A Comparative Institutional Analysis* (Bloomsbury Hart Publishing); Mulder, J. (2019) 'General Principle of equality between men and women' in Ziegler, K., Neuvonen, P. and Moreno-Lax, V. (eds) *Research Handbook on General Principles of EU Law* (Edward Edgar Publishing).
27 Schiek, D. (2014) 'Article 23: Equality between women and men' in Peers, S., Hervey, T., Kenner, J. and Ward, A. (eds) *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing).
28 For example, while substantive equality would require men and women to be treated equally irrespective of their sex, it may also require more advantageous treatment of one sex group or a subgroup within it to advance their equality of opportunity.
29 Fredman, S. (2011) *Discrimination Law* (2nd edn, Oxford University Press). pp. 25-33.
30 Westerman, P.C. (2000) 'The Principle of Equality as a Heuristic Device' in Westerman, P.C. (ed), *Non-Discrimination and Diversity* (Den Haag Boom Juridische Uitgevers) pp. 115, 122.

The difference between formal and substantive equality is often illustrated by reference to Aristotle's formula, according to which, equality requires treating 'like things alike and unlike things differently, according to their difference.'[31] The CJEU has picked up on this formula within the context of nationality and sex discrimination.[32] The first part of Aristotle's phrase captures the essence of formal equality as it focuses on the likeness of treatment. The question then remains how we assess likeness and difference. Non-discrimination law, in identifying specific protected characteristics, would then help us understand who is alike within the meaning of treating like things alike. Understood that way, non-discrimination law is an advancement or clarification of the general equality principle, as it stipulates not only a general idea of equality but fills it with meaning in the sense that certain differences (such as physical or biological differences between men and women) may not render people different. They should thus be treated alike. The ban on direct sex discrimination in EU law primarily but not exclusively adopts this understanding of equality.

Whether the second half of the formula ('treating things differently, according to their difference') indeed addresses a substantive understanding of equality is somewhat more controversial. Proponents would point to the fact that the second half of the phrase recognises that people are differently situated and are thus differently affected by formally equal treatment. Accordingly, differences should be taken into account and responded to. This can be recognised under the concepts of direct as well as indirect sex discrimination. A typical example in the context of direct sex discrimination is the difference between workers who are pregnant and those who are not, considering that the former are certainly in a very different situation. Formally equal treatment would thus have a different effect on both groups. Indirect sex discrimination by its very nature considers 'apparently neutral' measures, practices or criteria that affect groups differently. Whether indirect sex discrimination law is able to consider differences beyond that has been discussed in relation to the difference between regular and overtime pay. For example, part-time workers may be entitled to additional overtime pay provided to full time workers, once they exceed their regular working time or once they exceed the regular working time of a full-time employee. The former would require a separate comparison of normal and overtime pay because they are different, the latter would require comparison of the pay overall, because it is all remuneration for work. Each approach is thus based on comparison but the understanding of difference varies.[33] This demonstrates that it can at times be rather difficult to assess when differential treatment is appropriate. Aristotle's formula itself is of little help here as it does not indicate how unlike things should be treated, other than that it should be 'according to their difference.'

If the concept of indirect sex discrimination is to ensure that people are treated equally well, it must be underpinned by a substantive understanding of equality. The second part of the formula is then not simply understood as different treatment, but as the substantive notion of equal treatment that renders certain characteristics completely irrelevant.[34] Accordingly, different treatment implies the inclusion of positive action, which is then not considered discriminatory.[35] However, while this may reflect the common understanding of substantive equality, it is not necessarily inherent in the formula itself and much of the CJEU case law has been criticised for ignoring the substantive dimension, as it focuses on likeness of treatment.[36]

31 Aristotle, Ethica Nicomachea V.3 1131a – b (W Ross trans, 1925).

32 Judgment of 14 February 1995, *Finanzamt Köln-Altstadt* v *Schumacker*, C-279/93, ECLI:EU:C:1995:31, para 30; judgment of 13 February 1996, *Gillespie* v *Northern Health and Social Services Board* C-342/93, ECLI:EU:C:1996:46, para 16.

33 See section 4.3.1, below.

34 Loenen, T. (1994) 'Rethinking Sex Equality as a Human Right' 12(3) *Netherlands Quarterly of Human Rights* 253; Loenen, T. (1994), 'Artikel 1: het discriminatiebegrip' in Heringa, A.W., Hes, J. and Lijnzaad, L. (eds), *Het vrouwenverdrag: een beeld van een verdrag* (Maklu) pp. 1-13; Loenen, T. (2000) 'Indirect Discrimination as A Vehicle For Change' 6(2) *Australian Journal of Human Rights* 77; Loenen, T. (1999) 'Indirect Discrimination: Oscillating Between Containment' and in Loenen, T. (eds) *Non-discrimination Law: Comparative Perspectives*, Kluwer Law International.

35 Arnardóttir, O.M. (2003) *Equality and Non-Discrimination Under the European Convention on Human Rights* (Martinus Nijhoff Publishers) p. 18.

36 Tobler, C. (2005) *Indirect Discrimination*, (Intersentia) pp. 26-28; Fredman, S. (1992) 'European Community Discrimination Law: A Critique' in 21(2) *Industrial Law Journal* 119.

Critics have also pointed to the deeply inegalitarian foundation of the formula, as it suggests that differences can indeed justify differential treatment.[37] The formula is rooted in a symmetric understanding of equality. In that sense, the focus on likeness is misleading, as it suggests that its presence or absence implies a certain response. Accordingly, the differential treatment because of unlikeness is only the logical flip side of treating like things alike and does not add any further substantive understanding of equality. Substantive equality on the other hand does not require either alike or different treatment but various responses to ensure equal results, equal opportunities, or equal participation. The concept of indirect sex discrimination cannot achieve this alone. Rather, its symmetric approach remains more closely connected to the Aristotle formula as a whole. Specifically, it recognises that equal – as in same – treatment can have different effects on groups that are differently situated by focusing on outcomes, but it does not spell out or determine specific treatment beyond that. While this approach can challenge structural disadvantages and thus can have transformative effects, as it requires duty bearers to re-evaluate the effect of their measures and practices and entitles the disadvantaged group to be treated like the advantaged group within the individual claims procedure, there is no general right to prevent levelling down rights in more general terms.[38]

Substantive equality does not focus on a person's characteristics, but on the social, economic and legal structures that surround them and that may lead to de facto disadvantages. Accordingly, it is concerned with the effects of treatment, group-sensitive and asymmetrical approaches.[39] Nevertheless, its multi-dimensional and dynamic nature makes it difficult to define. Fredman identifies four overlapping dimensions: readdressing disadvantages, readdressing stigma and stereotypes, ensuring participation, and accommodating differences and structural change.[40] Barnard and Hepple distinguish four different forms of substantive equality: equality of results; equality of opportunity, including the use of positive action measures in order to reduce or compensate for disadvantage; equal guarantees of human rights; and equality as equal dignity.[41] Indirect sex discrimination is most likely situated within the scope of equality of results and the readdressing of disadvantages. In that regard, its focus is not so much on the difference, but the disadvantage connected to it. Accordingly, it can also encourage structural change and accommodation, but its potential is limited by the objective justification.

Substantive equality within the realm of EU non-discrimination law should not be confused with an egalitarian understanding of equality. Namely, it does not require everybody to end up in an equal situation or ensure equal access to goods, benefits or wellbeing. For example, regarding access to employment, it entitles everybody to discrimination-free recruitment procedures, but it does not entitle all or even individual members of a disadvantaged group to access employment.[42] Accordingly, non-discrimination law has been placed within libertarian rather than egalitarian discourses.[43] Comparison then continues to be important because the liberty-interest is relative, as the necessary access to the mentioned goods also depends on the access that others enjoy. However, the aim is not to achieve equal outcomes but to reduce abiding, pervasive and substantial relative group disadvantages linked to the protective characteristics that prevent persons from living an autonomous and good life[44] or deliberative freedom.[45] While a more equal society may be a side effect, it is not its main aim. Such an understanding can explain the

37 Schiek, D. (2002) 'Torn between Arithmetic and substantive equality?' 18(2) *International Journal of Comparative Labour Law and Industrial Relations* 149.

38 Fredman, S. (2011) *Discrimination Law*, (2nd edn, Oxford University Press), p. 21; Fredman, S. (2001) 'Equality: A New Generation?' 30(2) *Industrial Law Journal* pp. 145, 155–57.

39 Schiek, D. (2002) 'Elements of a New Framework for the Principle of Equal Treatment of Persons in EC Law' 8(2) *European Law Journal* 290.

40 Fredman, S. (2016) 'Substantive Equality Revisited' 14(3) *International Journal of Constitutional Law* 712. Her earlier work referred to the redistributive, the transformative, the participative, and the recognition dimension. See Fredman, S. (2011) *Discrimination Law* (2nd edn, Oxford University Press), pp. 25-33.

41 Barnard, C. and Hepple, B. (2000) 'Substantive Equality' 59(3) *Cambridge Law Journal* 562.

42 Khaitan, T. (2015) *A Theory of Discrimination Law*, (Oxford University Press), pp. 130-133.

43 Khaitan, T. (2015) *A Theory of Discrimination Law*, Oxford University Press; Moreau, S. (2013) 'In Defence of a Liberty-based Account of Discrimination' in Hellman, D. and Moreau, S. (eds) *Philosophical Foundations of Discrimination Law*, Oxford University Press, pp 71-86; Moreau, S. (2010) 'What is discrimination?' 38(2) *Philosophy and Public Affairs*, pp. 143-179.

44 Khaitan, T. (2015) *A Theory of Discrimination Law*, (Oxford University Press), pp. 91-116.

45 Moreau, S. (2010) 'What is discrimination?' 38(2) *Philosophy and Public Affairs* pp. 143-179.

limits of direct and indirect discrimination well, but it also has implications for the scope of legitimate positive action measures, given that they must be designed considering the liberty interest of all parties involved.[46] If anything, non-discrimination law is one of many tools that are needed to achieve equality.[47] Specifically, the ground-based approach of EU non-discrimination law that only identifies specific protected characteristics will never be able to address all or even the most severe forms of inequality. Criticising EU non-discrimination law's limited potential in that regard may be accurate,[48] but does not appreciate the specific focus of EU non-discrimination law, which is neither designed nor able to replace traditional provisions of social and economic welfare. Its protection is contingent on the protected characteristic. In ideal circumstances, EU non-discrimination law cuts the link between the protected characteristic and inequality, including multitudes of interwoven disadvantages typically experienced by people with specific protected characteristics,[49] but without addressing other factors that cause or increase inequality.[50]

Where to place the EU concept of indirect sex discrimination within the dichotomy of formal and substantive equality is not obvious. Considering Aristotle's formula, we may simply take indirect sex discrimination as dealing with the application of the same principles to different situations – and that seems to indeed to be the understanding in some Member States.[51] However, distinguishing direct and indirect sex discrimination by reference to the first and second parts of Aristotle's formula is not very helpful in the EU context. First, direct discrimination at times also applies to the same treatment of different situations. For example, pregnant workers are in a different situation than non-pregnant workers but nevertheless are entitled to be treated the same as regards pay and working conditions. Secondly, a more nuanced assessment seems necessary to identify the specific contribution of indirect sex discrimination to substantive gender equality. On the one hand, it goes beyond a purely formal understanding of equality as it focuses on effects and outcomes of apparently neutral measures. Thus, formally equal treatment (such as the application of a specific measure, criterion, or practice to all) may be challenged because of the de facto group disadvantages it creates unless it can be justified. Whether the complainant ended up in this situation by choice is not relevant. On the other hand, the concept retains a symmetric understanding as it only focuses on comparative group disadvantages. Broader social and economic implications are not considered and do not impose any positive action upon the duty bearer (e.g. employer or legislation). For example, part-time workers may be entitled to equal hourly pay compared to full-time workers, but they do not need to be placed in an equally advantageous (or even minimum) economic position during their working life or retirement.[52] Similarly, measures, criteria and practices that disadvantage workers with care responsibilities can be identified as indirectly discriminatory because of their likely or demonstrable disadvantaging effect on female workers. However, challenging (and potentially abolishing) these measures does not necessarily change the structural gender inequality in which the disadvantage is rooted and that may encourage women to take up the majority of domestic responsibilities. For example, it does not change the gendered reality that women are more likely than men to take over care responsibilities and it does not challenge the private/public distinction which makes care responsibilities come under the sphere of private activity, to the detriment of women – for that, substantive rights, welfare entitlements and asymmetric policies (including positive action) are necessary. Such measures relate to the transformative dimension of substantive equality as they attempt to change unequal structures and tackle systematic discrimination and current unequal power relationships and dependencies.

46 Khaitan, T. (2015) *A Theory of Discrimination Law*, (Oxford University Press), pp. 215-240.
47 Schiek, D. (2009) 'From European Union Non-Discrimination Law Towards Multidimensional Equality Law for Europe' in Schiek, D. and Chege, V. (eds) *European Union Non-Discrimination Law*, (Abingdon, Routledge Cavendish), pp. 3, 10.
48 Somek, A. (2011) *Engineering Equality*, (Oxford University Press).
49 Mccolgan, A. (2014) *Discrimination, equality and the law*, (Hart publishing), pp. 16-19.
50 Holmes E. (2005) 'Anti-Discrimination Rights Without Equality' 68(2) *Modern Law Review* 175.
51 For example, **Latvia**, **Poland** and, for example, **Bulgarian** Administrative Court Sofia, Decision No. 2572 from 14.05.2012, No. 4726/2011 on indirect discrimination: 'therefore it is not a differential treatment of persons who belong to different protected grounds, it is rather a different level of harm, due to treating them equally.' See also CJEU, judgment of 8 May 2019, *RE* v *Praxair MRC*, C-486/18, ECLI:EU:C:2019:379.
52 Judgment of 13 May 1986, *Bilka* v *Weber von Hartz,* C-170/84, ECLI:EU:C:1986:204 paras 38-43.

3.2 Symmetrical or asymmetrical approach

The discussion above already hints at the distinction between symmetrical and asymmetrical approaches towards equality. EU law on direct and indirect sex discrimination is fundamentally symmetric. It does not protect women from discrimination but bans all sex discrimination. In principle, men as well as women fall under its scope of protection, even if men are not equally disadvantaged within society as a whole and the overwhelming number of sex discrimination cases concern discrimination against women. The need for sex-neutral measures, criteria and practices means that special benefits allocated to women are equally suspect as benefits allocated to men.

This affects all aspects of EU non-discrimination law and limits the law's ability to foster substantive equality. For example, the CJEU's approach towards positive action in employment has essentially prevented the beneficial treatment of women in order to achieve 'full equality in practice' (Article 157(4) TFEU), as it only allow the sex to be determinative if the candidates are equally qualified and the specific needs and circumstances of the male applicants/employees can potentially shift the assessment in their favour.[53] It neglects the systemic gendered biases within the evaluation of candidates that put the assessment's neutrality into question, such as unconscious biases that can lead to the overestimation of the experiences, skills, and qualifications of men compared to women.[54] Similarly, national provisions and practices that provide specific benefits to women only in order to compensate for disadvantages suffered because of career breaks due to maternity or parental leave also have been challenged under sex discrimination law.[55] Specifically, they were deemed to be outside the scope of positive action because they do not increase equal opportunities within women's professional life and thereby ensure full equality in practice between men and women in working life.[56] Parental leave provisions that were available to women have been held to discriminate against men too.[57]

Accordingly, the scope of specific rights only allocated to women have to be carved out carefully as the precise boundaries are often uncertain. For example, EU law stipulates that benefits in relation to pregnancy and maternity do not constitute direct sex discrimination, but women nevertheless may not be treated less advantageously because of pregnancy and maternity.[58] However, this does not apply where the Pregnancy Directive provides for alternative arrangements, for example regarding entitlements to payments.[59] The Parental Leave Directive can equally exclude certain issues from the scope of consideration under EU non-discrimination law.[60] On the other hand, not every disadvantage linked to pregnancy constitutes sex discrimination. For example, the CJEU has drawn a distinction between pregnancy-related illnesses before and after birth and considers the latter to be comparable to other illnesses, while the former may not be,

53 Judgment of 17 October 1995, *Kalanke,* C-450/93, ECLI:EU:C:1995:322; judgment of 11 November 1997, *Marschall*, C-409/95, ECLI:EU:C:1997:533; judgment of 28 March 2000, *Badeck,* C-158/97, ECLI:EU:C:2000:163; judgment of 6 July 2000, *Abrahamsson*, C-407/98, ECLI:EU:C:2000:367.

54 See chapter 2 above.

55 Judgment of 29 November 2001, *Griesmar*, C-366/99, ECLI:EU:C:2001:648.

56 Judgment of 29 November 2001, *Griesmar*, C-366/99, ECLI:EU:C:2001:648; judgment of 17 July 2014, *Leone*, C-173/13, ECLI:EU:C:2014:2090.

57 Judgment of 30 September 2010, *Roca Álvarez*, C-104/09, ECLI:EU:C:2010:561; judgment of 16 July 2015, *Maïstrellis*, C-222/14, ECLI:EU:C:2015:47.

58 Article 2(2)(c) Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, pp. 23-36.

59 For example, women on maternity leave are not entitled to full pay but instead to maintenance of a payment or an adequate allowance (Art 11(2)(b) Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (10th individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) OJ L 348, 28.11.1992, pp. 1-7). In its judgment of 13 February 1996, *Gillespie* v *Northern Health and Social Services Board* C-342/93, ECLI:EU:C:1996:46, the Court held that the payment may not be so low that is undermines the purpose of maternity leave. Moreover, in its judgment of 19 November 1998 on *Handels-og Kontorfunktionaerernes Forbund I Danmark* v *Faellesforeningen for Danmarks Brugsforeninger* Case C-66/96, ECLI:EU:C:1998:549, the CJEU held that pregnancy-related illnesses are not fundamentally different to other illnesses in regard to pay. If workers on sick leave receive full pay, the employer may not exclude pregnancy related illnesses from that scope.

60 Judgment of 18 September 2019, *Ortiz Mesonero*, C-366/18, ECLI:EU:C:2019:757.

depending on the circumstances.[61] The symmetric approach thus creates various difficulties in assessing the precise scope of EU non-discrimination law and the rights it entails.

However, any critique of the symmetric nature of EU non-discrimination law should be nuanced. On the one hand, it is indeed important that national laws and practices are not based on stereotypes. Provisions that only provide childcare-related benefits to women exclude men in the same situation from the benefit and reinforce stereotypes about women's gender roles and care responsibilities. Accordingly, they discourage men from taking up an equal share of these responsibilities and undermine the goal of fostering substantive gender equality.[62] Moreover, it has been suggested that non-discrimination law in general is only symmetric if the distinguishing protected characteristic of the advantaged and disadvantaged group is a 'source of important (and usually valued) personal identity' for both groups.[63] This is the case regarding sex, as being male or female forms an important part of our personal identity, but less so regarding disability, as abled people are unlikely to consider this as a source of importance. Approached in that way, symmetry is pragmatic in nature as it makes non-discrimination law more palatable to society as a whole than the special protection of women.

On the other hand, its symmetric nature has reduced the scope for rules that are sensitive to structural gender inequality within the Member States. For example, the **German** expert highlights that the CJEU's restrictive approach towards positive action measures has reduced their use, as they now require rather complicated recruitment and promotion procedures. Similarly, the CJEU case law challenging asymmetrical rules for the benefit of women significantly reduced the pensions of female civil servants and thus negatively contributed to the pension gap in **France**. The emphasis on sex-neutral (symmetrical) rather than asymmetrical rules ignores structural gender inequality and stereotypes that often disadvantage women more than men, even if they are in the same or similar situation. The difficulty of capturing those under the scope of EU non-discrimination law becomes obvious in *Leone*.[64] In the case, the CJEU questioned whether the aim of the benefit that was related to leave taken for the purpose of childcare (including maternity and parental leave) was indeed to compensate for pension disadvantages related to the leave, given that leave periods were included in the pension calculation. However, the subsequent national case law on the matter pointed out that women with childcare responsibilities suffer various disadvantages throughout their career that go beyond the specific disadvantage related to temporary absence from work.[65] Accordingly, it considered the measures justified although they indirectly discriminated against men because they were less likely to take childcare leave. While the rules benefited those men who indeed did take childcare leave, the recognised disadvantage was thus not limited to the leave. Men who take a similar amount of leave may not suffer similar disadvantages because they are less related to the objectively observable temporary absence and more related to different gender expectations for men and women, including de facto care responsibilities after the leave as well as unfounded assumptions about differences in the way women and men prioritise work once they become parents.[66] Given that many of these disadvantages are systematic but difficult to capture, as they are neither linked to specific measures, criteria or practices nor easily exposed under the scope of direct sex discrimination, it may seem sensible to take an asymmetric approach and provide certain benefits to all women with children, even if this constitutes a rather broad-brush approach. However, this obviously neglects the needs of fathers who are in a similar situation or indeed fulfil typical female gender roles within their families. Female gender roles may thus be more appropriate criteria than the female sex.

The symmetric approach leaves little room to consider these systematic and structural inequalities that create different effects for men and women within objectively similar situations and decrease or increase

61 Judgment of 8 September 2005, *McKenna*, C-191/03, ECLI:EU:C:2005:513.
62 Mulder, J. (2018) 'Promoting substantive gender equality through the law on pregnancy discrimination, maternity and parental leave', 1 *European Equality Law Review* 39.
63 Khaitan, T. (2015) *A Theory of Discrimination Law* (Oxford University Press) p. 172.
64 Judgment of 17 July 2014, *Leone*, C-173/13, ECLI:EU:C:2014:2090.
65 See section 4.4.4 below.
66 Mulder, J. (2017) *EU Non-Discrimination Law in the Courts* (Hart Publishing), Chapter 2.

disadvantages linked to specific actions depending on the personal characteristics of the person involved. Accordingly, in general, the symmetric approach can be somewhat blind to the whole range of systemic issues of inequality, as it only focuses on the disadvantages that can be identified in the individual case – and EU indirect sex discrimination law is no exception to this. While it does consider de facto disadvantages and outcomes of measures, criteria and practices, and thus goes beyond the scope of formal equality, duty bearers are not obliged to ensure equality in practice as long as they do not exploit the current structures of inequality and vulnerability. Instead, indirect sex discrimination remains within the symmetric logic by focusing on the 'comparatively unfavourable treatment.' While the 'particular disadvantage' can be demonstrated in various ways, it is not considered within the broader context of social and economic inequality, but with reference only to the specific circumstances of the case. It neither states what would be appropriate treatment nor does it directly engage with the broader structural and systemic structures of inequality that may change the beneficial or detrimental nature of a specific burden or requirement. For example, the CJEU accepted a measure of preferential admissions procedures for male students that had completed compulsory military/civil service because it compensated for the fact that the start of their studies was delayed due to the military/civil service.[67] However it failed to consider whether the military/civil service indeed de facto disadvantaged these students in terms of career development and prospects beyond the relative short delay at the beginning of their studies. It also rejected any consideration of similar disadvantages that women may experience because of parental or maternity leave, as it considered them mostly hypothetical, assuming that students do not yet have children. It later rejected the comparability of parental leave and military/civil service altogether.[68] In a similar vein, the Supreme Court of **Cyprus**, assessing the order of public school teachers' appointments that depended on their year of graduation, simply held that the procedure disadvantaged men, because they had to complete two years of military service, only one year of which was taken into account when calculating the year of graduation. They were thus appointed later than women.[69] The court did not elaborate further on why this creates a 'particular disadvantage' for men in more general terms.

The question is then whether an asymmetrical approach is indeed more appropriate. For example, it has been suggested that CEDAW's asymmetrical approach is much better equipped to challenge measures that hurt women under the guise of equal treatment of men and women and also avoids the assimilation of women to the male norm, by recognising women's diversity, and challenging the male standard instead.[70] As we will see below, the asymmetrical approach requires much more detailed considerations of the causes of disadvantages and thus focuses on socially constructed gender roles rather than sex to determine its scope of protection.[71] Accordingly, men may benefit from these protective mechanisms, if they experience comparable disadvantages as the protected group, for example because they are the primary care-giver for their children or otherwise express gender roles that are usually associated with the female sex and carry a specific disadvantage.[72]

3.3 Corrective and/or distributive (social) justice?

The focus of indirect discrimination on outcomes, relative group disadvantage and the subsequent objective justification rather than wrongdoing led to the suggestion that it is a distributive rather than a

67 Judgment of 7 December 2000, *Schnorbus*, C-79/99, ECLI:EU:C:2000:676; see detailed discussion below in section 4.4.4.

68 Judgment of 8 June 2004, Österreichischer Gewerkschaftsbund, C-220/02, ECLI:EU:C:2004:334. The ÖGB case is further discussed in section 4.2, below.

69 **Cyprus** Supreme Court, *Yiannakis Papaioannou* v *Republic of Cyprus via Educational Service Committee,* 27 January 2011, Case number 503/2009.

70 Holtmaat, R. and Tobler, C. (2005) 'CEDAW and the European Union's Policy in the Field of Combating Gender Discrimination' 12 *Maastricht Journal European & Comparative Law* 399.

71 See below 5.2.

72 Loenen, T. (1994), 'Artikel 1: het discriminatiebegrip' in Heringa, A.W., Hes, J. and Lijnzaad, L. (eds), *Het vrouwenverdrag: een beeld van een verdrag* (Maklu) pp. 1-13; Loenen, T. (2000) 'Indirect discrimination as a vehicle for change' 6(2) *Australian Journal of Human Rights* 77; Loenen, T. (1999) 'Indirect discrimination: oscillating between containment and revolution' in Loenen, T. and Rodrigues, P.R. (eds) *Non-discrimination Law: Comparative Perspectives*, Kluwer Law International.

corrective concept of justice.[73] For Eidelson, this is reflected in the prioritisation of the protected group.[74] For example, he argues that if a hiring policy that excludes pregnant workers is based on the (correct) assumption that these workers produce additional costs for the company, a challenge of such a policy is not aimed at hedging 'against pretext or bias, but rather [at improving] women's standing relative to what simple (but true) evenhandedness with respect to sex in the firm's hiring would bring about'.[75] Accordingly, this is an example of redistributive justice. However, one may question the neutrality of the cost argument. Specifically, employers are not always burdened with maintenance pay or salary costs if the national system provides for access to statutory benefits or social security. While additional costs are nevertheless associated with pregnant employees, for example, because of the need to hire and retrain a replacement, their protection within the workplace can also reduce long-term cost as it fosters employees' loyalty to the employer and reduces the need for training of new employees. The cost argument can thus often only be upheld if we take a narrow view of the employee's contribution to the employer's business. Even if we accept the cost argument as reflecting a non-biased assessment of the employee's contribution, it does not help us to distinguish between direct and indirect sex discrimination law within the EU context. After all, pregnancy discrimination is not a 'characteristic example'[76] of indirect sex discrimination but one of direct sex discrimination.[77] Direct and indirect sex discrimination can thus impose duties to absorb some of the costs in order to bring about equal opportunities, irrespective of intent or biases. Moreover, indirect discrimination law may also address practices that wrong the victim. Namely, if practices rely on indicators (e.g. working part time) that are not neutral because of previous injustice (e.g. gender roles), they compound that original injustice.[78] While indirect discrimination does not challenge the original injustice, it does prevent its further exploitation. The focus on the current disproportionate effects of a policy without an exploration of the past reasons for it, shows that indirect discrimination can both challenge measures that compound previous injustice and/or are based on gender stereotypes and biases, as well as current structural differences that disadvantage some groups. The extent to which the concept of indirect discrimination ensures recognition of diversity is thus not limited to recognising current structural inequalities that are the product of past injustices, but also extends to the recognition of differences and different needs in the present. Regarding the latter, indirect sex discrimination law interacts with specific substantive rights, such as the right to parental leave and flexible work arrangements.[79]

The distinction between corrective and distributive justice thus says little about specifically how indirect discrimination law can tackle structural inequality. For example, indirect sex discrimination does not draw a distinction between prescriptive and descriptive stereotypes.[80] Rather, it recognises the descriptive reality as well as its prescriptive nature, as it considers statistical evidence while denying or at least reducing the relevance of the choices that women may technically have when taking up part-time work to balance domestic care and work responsibilities. Accordingly, it is irrelevant that the stereotype may have some statistical truth to it that can explain the differential treatment, unless it can be objectively justified. It has been suggested that the room for an objective justification itself demonstrates the redistributive nature of the concept of indirect sex discrimination.[81] Specifically, the proportionality assessment looks like a redistributive question, if it conceives whether the employer or other duty bearers should be burdened with the reorganisation necessary to abolish the discriminatory status quo. However, the objective justification

73 Gardner, J. (1996) 'Discrimination as Injustice', 16 *Oxford Journal of Legal Studies* pp. 353-367; Gardner, J. (1998) 'On the ground of her sex(uality)' 18 *Oxford Journal of Legal Studies* pp. 167-188.
74 Eidelson, B. (2015) *Discrimination and Disrespect* (Oxford University Press) p. 51.
75 Eidelson, B. (2015) *Discrimination and Disrespect* (Oxford University Press) p. 49.
76 Eidelson, B. (2015) *Discrimination and Disrespect* (Oxford University Press) p. 48.
77 Judgment of 8 November 1990, *Dekker* v *Stichting Vormingscentrum voor Jong Volwassenen*, C-177/88, ECLI:EU:C:1990:383.
78 Hellman. D. (2018) 'Indirect Discrimination and the Duty to Avoid Compounding Injustice' in Collins, H. and Khaitan, T. (eds.) *Foundations of Indirect Discrimination Law* (Hart Publishing) pp. 105-121.
79 Directive 2019/1158/EU of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, OJ L 188, 12.7.2019, pp. 79-93; Oliveira, Á., De la Corte-Rodríguez, M. and Lütz, F. (2020) 'The new Directive on Work-Life Balance: towards a new paradigm of family care and equality?' 45(3) *European Law Review*, 295; De la Corte-Rodriguez, M. (2019) *EU Law on Maternity and Other Child-Related Leaves. Impact on Gender Equality* Kluwer Law International.
80 For a discussion on the distinction between prescriptive and descriptive stereotypes, see chapter 2, above.
81 As suggested by Gardner, J (1996) 'Discrimination as Injustice' 16 *Oxford Journal of Legal Studies* pp. 353-367.

test can also be understood as an evidential stage to establish indirect discrimination rather than justify it.[82] Specifically, it should be noted that cost concerns alone cannot justify prima facie cases of indirect sex discrimination.[83] The justification's primary question is thus not whether the potential burden on the duty bearer is reasonable.

3.4 Vulnerability and intersectionality

Attacking identity-based non-discrimination law from an egalitarian perspective, Fineman suggests that the concept of vulnerability is better suited to foster substantive equality. Speaking to the US context, she criticises the fact that a focus on protected characteristics has preserved the image of a liberal subject and ignored the de facto structural disadvantages that individuals experience in a world of unequal allocation of privilege.[84] Her central message is the need to replace the liberal with a vulnerable subject. Accordingly, vulnerability is universal to the human existence as well as particular to the individual experience. It is universal because all humans are vulnerable to events that are outside their control and it is particular because we experience our vulnerability differently, depending on the assets available to us and the broader economic and institutional context of our lives.[85] To improve resilience for everybody, a responsive state needs to focus on the fair and proper allocation of assets.[86] The concept of vulnerability is then used to criticise US non-discrimination law's failure to foster or ensure an egalitarian society as well as to critique the conception of the liberal human subject. While not all of the criticism can be translated to the EU legal context, a vulnerability-centred critique can certainly expose limits and potentials.

Specifically, a vulnerability focus can be a helpful tool in recognising disadvantages within the context of indirect sex discrimination. A focus on vulnerability within the context of the European Convention on Human Rights has helped the European Court of Human Rights to approach equality issues from a more substantive perspective by recognising the vulnerability of specific groups.[87] For example, it has used the terminology of vulnerability to recognise intersectional disadvantages and discrimination.[88] While Fineman rejects the suggestion that multiple intersecting identities produce compounded inequalities and instead encourages a focus on 'power and privilege that interact to produce webs of advantages and disadvantages,'[89] this does not seem contrary to an intersectional account per se, as the latter can also focus on structural inequality that produces social disadvantages: it is not the identity that creates the disadvantage, but the social reaction to it. As EU non-discrimination law limits the number of protected characteristics, there is also less danger of an endless intersecting of personal disadvantages. Instead, indirect sex discrimination's recognition of disadvantages is contingent on the protected characteristic and thus relates to it. Economic and distributive issues are excluded, if they are perceived as objective structures.[90]

82 Hervey, T. (1993) *Justifications for Sex Discrimination in Employment* (London Butterworths, Current European Community Legal Developments Series); see discussion below 4.4.2.

83 See section 4.4.4, below. CJEU, judgment of 24 February 1994, *Roks,* C-343/92, ECLI:EU:C:1994:71, para 35; judgment of 20 March 2003, *Kutz-Bauer*, C-187/00, ECLI:EU:C:2003:168; judgment of 23 October 2003, joined cases C-4/02 and 5/02, *Schönheit* and *Becker* ECLI:EU:C:2003:583.

84 Fineman, M.A. (2013) 'Beyond Identities: The Limits of an Antidiscrimination Approach to Equality' 92 *Boston University Law Review* 1713.

85 Fineman, M.A. (2008) 'The vulnerable subject: Anchoring Equality in the Human Condition' 20(1) *Yale Journal of Law and Feminism* pp. 9-12.

86 Fineman, M.A. (2008) 'The vulnerable subject: Anchoring Equality in the Human Condition' 20(1) *Yale Journal of Law and Feminism* pp. 12-15.

87 Timmer, A. (2013) 'A Quiet Revolution: Vulnerability in the European Court of Human Rights' in Fineman, M. and Grear, A. (eds.) *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate) pp. 147-170; Peroni, L., and Timmer, A. (2013) 'Vulnerable Groups: the Promise of an Emergent Concept in European Human Rights Convention Law' 11 *International Journal of Constitutional Law* pp. 1056-1085.

88 La Barbera, M.C. and Cruells López, M. (2019) 'Toward the Implementation of Intersectionality in the European Multilevel Legal Praxis: B. S. v Spain' 53(4) *Law & Society Review* 1167.

89 Fineman, M.A. (2008) 'The vulnerable subject: Anchoring Equality in the Human Condition' 20(1) *Yale Journal of Law and Feminism* p. 16.

90 Conaghan, J. (2009) 'Intersectionality and the Feminist Project in Law,' in Grabham, E., Cooper, D., Krishnadas, J. and Herman, D. (eds) *Intersectionality and Beyond, Law, Power and the Politics of Location* (Routledge-Cavendish) p. 21.

EU indirect sex discrimination law can be a useful tool to recognise these intersectional or otherwise sex-based vulnerabilities.[91] Its primary focus on the disadvantaging effect of a measure (unless justified) neither requires a current nor a past direct link to sex discrimination and instead focuses on the disadvantaging and advantageous structures themselves. While EU non-discrimination law primarily focuses on market exclusion, as it is concerned with discrimination within the labour market and other economic activities, the vulnerabilities that can be detected under its scope are not limited to vulnerabilities that originate within that sphere. Specifically, it recognises the interaction of different areas perceived as private or public. Structural inequality and dependencies in the private sphere can thus affect women's standing within the public or professional sphere. Taken seriously, this does not only relate to inequalities regarding private care responsibilities, but many other gendered issues, including domestic (sexual) violence, religious recognition, or gendered disabilities. The vulnerability concept can thus enrich our understanding of indirect sex discrimination, as it makes explicit how interacting powers and privileges produce structural disadvantages for some. After all, how vulnerability is experienced 'in particular' is also affected by identities that are not historically neutral, such as sex and gender.[92] Thus, even if the contingent nature of indirect sex discrimination prevents it from becoming or replacing broader welfare provisions, structural vulnerabilities that cause inequality are very much at the centre of the concept. The apparently neutral measures that can be challenged under its scope are thus dynamic and assessed in their structural context.[93] They are not viewed as parallel to differential treatment directly based on the protected characteristic or simply as disguised measures of direct sex discrimination.[94]

3.5 Recognition and redistribution

Schiek suggests an alternative approach to EU non-discrimination law: rather than focusing on economic disadvantages, she suggests that EU non-discrimination law addresses exclusion that stems from otherness within the cultural sphere.[95] Accordingly, she draws a line between market-based indicators of disadvantages, such as class and poverty, and the personal characteristics protected by EU non-discrimination law. Although EU non-discrimination law focuses primarily on the economic context, it is concerned with market exclusion that stems from lack of recognition, rather than economic disadvantages as such, and accordingly, its primary focus is cultural exclusion.

Picking up Fraser's distinction between redistributive aims and cultural recognition,[96] Schiek argues that EU non-discrimination law predominantly tackles the othering of groups with certain characteristics that are the consequence of different allocations of privilege that primarily produce cultural exclusions.[97] This approach can first explain the limited number of protected characteristics. If EU non-discrimination law focuses on cultural 'otherness', it does not need to include economic disadvantages, such as class or poverty, even if the latter significantly contribute to the de facto disadvantages, inequality and significant suffering caused by stereotypes and stigma. Secondly, it draws a clear distinction between EU non-discrimination law with some, limited, redistributive effects and general welfare norms with a more specific focus on economic needs and disadvantages.

91 Mulder, J. 'Group disadvantages and vulnerabilities within EU consumer law: Two sides of the same coin?' (forthcoming).
92 Fineman, M.A. (2013) 'Feminism, Masculinities, and Multiple Identities' 13(2) *Nevada Law Journal* p. 637.
93 Croon-Gestefeld J. (2017) *Reconceptualising European Equality law: A Comparative Institutional Analysis*, Bloomsbury Hart Publishing, p. 43.
94 This however seems to be the conclusion of Holmes in Holmes, E. (2005) 'Anti-Discrimination Rights Without Equality' 68(2) *Modern Law Review* p. 184, in which she considers that the 'apparently neutral measures' become protected characteristics themselves once they are identified as imposing a 'particular disadvantage'.
95 Schiek, D. (2018) 'On uses, mis-uses and non-uses of intersectionality before the Court of Justice (EU)' 18(2/3) *International Journal of Discrimination and the Law* 82; Schiek, D. (2016) 'Revisiting intersectionality for EU anti-discrimination law in an economic crisis – a critical legal studies perspective', 2 *Sociologia del Diritto* 23.
96 Fraser, N. (2007) 'Re-framing justice in a globalizing world' in Lovell, T. (ed) *(Mis)Recognition, Social Inequality and Social Justice* (Abingdon, Routledge) pp. 17-35.
97 Schiek, D. (2016) 'Revisiting intersectionality for EU anti-discrimination law in an economic crisis –a critical legal studies perspective', 2 *Sociologia del Diritto* 23, 24-25.

EU non-discrimination law focuses on disadvantages arising from 'otherness' within the context of Western normative expectations regarding for example femininity, emancipation and gender expression. 'Otherness' can then become a specific marker that creates social disadvantages through market exclusion. To combat these effects, EU non-discrimination law adopts two interlinked strategies focused on recognition. First, its anti-stereotype approach aims at ensuring that everybody can live free from stereotypes. Specifically, within sex discrimination, this means that women should be free to step out and live their lives free from culturally expected gender roles. They may not be excluded from accessing specific work or activities simply because of their sex. For example, in the context of indirect sex discrimination, it prevents the exclusion of part-time workers from pensions based on the assumption that their financial contribution to the household is only ancillary within a classic breadwinner model. Secondly, EU non-discrimination law combines this anti-stereotype approach with the recognition of diversity to properly address disadvantages that flow from 'otherness.' An anti-stereotype approach alone would not achieve that, because it would not recognise de facto differences and disadvantages that may require different responses. Within the context of indirect sex discrimination law, diversity has been recognised predominantly with reference to the different cultural gender norms that often result in an unequal division of labour of care and impose extra burdens on women. Accordingly, non-discrimination law tackles structural exclusion in the cultural sphere rather than economic exclusion, as such. It enables individuals to live their life free from the shackles of stereotypes and assimilation, but its purpose is not redistributive like other social welfare norms.[98]

Nevertheless, recognition of diversity can have redistributive consequences, for example by imposing duties of reasonable accommodation.[99] These redistributive consequences may also influence the scope of indirect discrimination law. Specifically, if recognition of diversity requires redistribution at times, reasonable accommodation cannot be limited to disability discrimination. By focusing on disadvantages within groups rather than individual needs, indirect sex discrimination can specifically impose duties akin to accommodation concerned with structural or systemic disadvantages. As such, the redistributive element of indirect sex discrimination can lead to significant structural change. Within the objective justification assessments, redistributive questions can then matter, too, specifically regarding the necessity requirement and the consideration of alternative less harmful measures.[100] Moreover, indirect discrimination is particularly useful in identifying diversity and to challenge measures that are, although apparently neutral, based on the white heterosexual male that is considered to be the norm. As such, it can uncover differences without essentialising womanhood.

98 Schiek, D. (2018) 'On uses, mis-uses and non-uses of intersectionality before the Court of Justice (EU)' 18(2/3) *International Journal of Discrimination and the Law* 82; Schiek, D. (2015) 'Proportionality in Age Discrimination Cases – a Model Suitable for Socially Embedded Rights' in Numhauser-Henning, A. and Rönnmar, M. (eds) *Age Discrimination and Labour Law: Comparative and Conceptual Perspectives in the EU and beyond* (Wolters Kluwer) pp. 31-92.

99 Schiek, D. (2016) 'Revisiting intersectionality for EU anti-discrimination law in an economic crisis –a critical legal studies perspective', 2 *Sociologia del Diritto* 23.

100 See further discussion below 4.4.

4 The concept of indirect discrimination in EU law and its application in the Member States

The EU concept of indirect sex discrimination within employment was first developed within the CJEU case law. Subsequent legal definitions of the concept and related issues such as the burden of proof have in many ways codified the principles that were developed by the Court. Its case law thus continues to be an important legal source for determining the exact scope of indirect sex discrimination, even in areas where subsequent codification has added to its clarification and expanded the definition of indirect sex discrimination law, specifically regarding the need for statistical evidence. Moreover, the case law most effectively illustrates the precise effect of indirect discrimination law as well as its potential to ensure or foster substantive gender equality. Accordingly, this section will primarily focus on the CJEU's approach to indirect sex discrimination law.

The CJEU developed its own definition of indirect sex discrimination in *Jenkins* and *Bilka.* The definition has two parts or stages. First, indirect sex discrimination can be established if a neutrally worded (pay) practice has a disparate impact on a much higher proportion of women or men respectively. Secondly, there must be no objective justification.[101] Distinct from its approach concerning indirect discrimination based on nationality, the Court insisted that the proportionate disadvantage has to be established by statistics and that the objective justification must be unrelated to any discrimination on grounds of sex.[102] The subsequent codification of the definition also considered statistics relevant.[103] However, according to the current definition in Article 2(1)(b) of the Recast Directive,[104] indirect sex discrimination occurs 'where 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.' As such, indirect discrimination is broadly conceived, as the definition includes hypothetical situations and has abandoned the need for a disproportional disadvantage. It is also consistent with the definition of the 2000 directives on discrimination based on race and ethnic origin, disability, age, sexual orientation, and religion and belief.[105] Accordingly, there is plenty of scope for cross-fertilisation between the different protected grounds and the concept of indirect sex discrimination should inform assessments concerned with indirect discrimination based on the 'other grounds' and vice versa. In particular, the development of the concept in relation to sex discrimination influences the interpretation by the CJEU of indirect discrimination on other grounds.

EU directives on employment and working conditions cover a wide range of issues that also fall within the scope of indirect sex discrimination. For example, EU directives concerned with specific atypical employment contracts, such as part-time work, temporary contracts and agency workers,[106] potentially overlap in scope and/or complement the protection under the concept of indirect sex discrimination, while new forms of employment within the gig or collaborative economy may nevertheless reveal significant

101 Judgment of 13 May 1986, *Bilka* v *Weber von Hartz,* C-170/84, ECLI:EU:C:1986:204.

102 Schiek, D. (2007) 'Indirect Discrimination' in Schiek, D., Waddington, L. and Bell, M. (eds) *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Ius Commune Casebooks for the Common Law of Europe (Hart Publishing) pp. 323, 357.

103 Article 2(2), Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex OJ L 14, 20.1.1998, pp. 6-8.

104 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, pp. 23-36.

105 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, 19.7.2000, pp. 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, 2.12.2000, pp. 16-22.

106 Council Directive 97/81/EC of 15 December 1997 concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC, OJ L 14, 20.1.1998, pp. 9–14; Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ L 175, 10.7.1999, pp. 43-48; Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ L 327, 5.12.2008, pp. 9-14.

gaps within the protection.[107] There may not be a prima facie reason to assume that women are more likely than men to work within these atypical work arrangements other than part-time work. However, systemic gender inequality nevertheless can have the result. If we take an intersectional perspective, for example by reference to sex and race or religion, we can explore vulnerabilities experienced by some women that go beyond issues related to childcare and motherhood. Some groups of women may face additional difficulties in accessing regular employment. Potentially, work within the new economies or temporary employment then becomes their only option. Indeed, statistical evidence demonstrates that more women than men work on temporary contracts even if the differences vary between the Member States.[108]

EU entitlements related to maternity and parenthood further elevate the need for a robust application of the concept of indirect sex discrimination law as these substantive rights and the reason why they are allocated interact with the right to non-discrimination. First, men must have equal access to parental leave but not maternity leave and some of the CJEU case law on sex discrimination law has provided some indication of how to distinguish between them.[109] Secondly, the way in which leave can be taken and the long-term consequences of using the leave can both potentially be relevant within the scope of indirect sex discrimination law, especially if Member States go beyond the minimum requirements developed by EU law. For example, while the EU directives on work-life balance and parental leave[110] provide rights to all parents to enable them to combine work and domestic responsibilities, the take-up of these rights is still widely gendered. While new forms of leave may have encouraged fathers to take leave to care for their children and the gender care gap varies between the Member States, the overwhelming number of parents who take childcare related leave are still mothers. Moreover, there is some evidence that fathers use their leave entitlements differently than mothers, with less focus on long-term, everyday care, which is then left to mothers.[111] Accordingly, the long-term disadvantages that flow from taking up the leave can be, and usually are, assessed under the scope of indirect sex discrimination law. In addition, it could be asked whether the way these substantive rights are made available can create disadvantages for the one taking up such leave, for example because they have to reduce their working time to be entitled to parental leave arrangements, the often unpaid nature of the leave and the difficulty of returning to their previous role or an equivalent position. While the rights provided by the Parental Leave Directive and now the Work-life Balance Directive may limit the scope for these arguments under EU law,[112] this could still be relevant within the national context. As such, the EU directives can create new areas of exploration for the concept of indirect sex discrimination law as well as new issues that have to be addressed under its scope.

The following section will explore our current understanding of the EU concept of indirect sex discrimination as developed by the CJEU case law and EU legislation. It will first discuss the prima facie distinction between direct and indirect sex discrimination (4.1), it will then consider the relevance of comparability of situations within the context of indirect sex discrimination (4.2) as the CJEU sometimes considers this

107 Specifically if it falls outside the scope of Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, OJ L 180, 15.7.2010, pp. 1-6.

108 Employment and Social Development in Europe 2020 p. 26. The proportion of employees aged 15-64 on temporary contracts decreased by 0.6 percentage points to reach 14.9 % in 2019, the lowest rate since 2013. The proportion for women is 1.1 percentage points higher than for men (15.5 % versus 14.4 %). Differences between Member States remain very large, with several countries displaying percentages at or above 20 % (the **Netherlands**, **Poland**, **Portugal** and **Spain**) although there has been a declining trend in almost all countries. Involuntary temporary work (employees with a temporary contract because they could not find a permanent job) in the EU in 2019 decreased to represent 52.1 % of all temporary employees, the lowest rate since 2005.

109 Judgment 18 November 2004, *Sass*, C-284/02, ECLI:EU:C:2004:722; judgment of 30 September 2010, *Roca Álvarez*, C-104/09, ECLI:EU:C:2010:561; De la Corte-Rodriguez, M. (2019) *EU Law on Maternity and Other Child-Related Leaves. Impact on Gender Equality*, Kluwer Law International.

110 Directive 2019/1158/EU of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, OJ L 188, 12.7.2019, pp. 79-93.

111 For further discussion and references see Mulder, J. (2018) 'Promoting substantive gender equality through the law on pregnancy discrimination, maternity and parental leave' 1 *European Equality Law Review* 39.

112 Judgment of 18 September 2019, *Ortiz Mesonero*, C-366/18, ECLI:EU:C:2019:757.

as a preliminary issue. The discussion will then consider the two parts of the definition of indirect sex discrimination in detail, starting with the way in which a 'particular disadvantage' can be established (4.3) and continuing with an analysis of objective justification (4.4).

4.1 Distinction between direct and indirect discrimination

The distinction between direct and indirect sex discrimination is not always straightforward and recent literature suggests that courts around the world (including the CJEU) take a flexible approach that at times blurs the differences between the two concepts.[113] Given the closed, limited list of objective justifications within the scope of direct sex discrimination, courts may also be tempted to consider a case under the scope of indirect sex discrimination if they want to justify the measure in question. The difference between the scope of objective justification may thus explain some of the uncertainties that become apparent within the case law. Still, the initial distinction between direct and indirect discrimination within EU law is quite clear. The prohibition of direct sex discrimination bans differential treatment directly based on a person's sex while the prohibition of indirect discrimination challenges measures, criteria and practices that are neutral in appearance, but nevertheless disadvantage people of one sex. Further one may be inclined to distinguish the concepts by considering direct discrimination to be overt and indirect discrimination to be covert because the latter bases its differential treatment on all kinds of (apparently neutral) measures, criteria or practices, while the former is directly based on the protected characteristic. However, in practice it is often difficult to demonstrate that a differential treatment is directly based on a protected characteristic while cases of indirect discrimination are often obvious if one focuses on the effects of the measure in question.

Moreover, while **direct sex discrimination** certainly covers individual differential treatment based on the person's sex, the CJEU has expanded direct sex discrimination in two ways that emphasise the substantive approach towards equality that underpins all EU non-discrimination law. First, it adopted a **broad notion of sex** as a protected ground by including transsexuality (but not sexual orientation) under its scope.[114] Specifically, it held that discrimination based on gender reassignment is 'essentially if not exclusively, [based] on the sex of the person concerned.'[115] The fact that men and women undergoing gender reassignment are equally disadvantaged, does not change that assessment. Secondly, the Court subsumed **criteria directly linked to sex** under the scope of direct sex discrimination. The latter enabled the court to adopt an objective approach towards direct sex discrimination that predominantly focuses on the effects of a measure rather than the ill intention of the duty bearer.

The latter approach seems uncontroversial if the differential treatment is based on a criterion that **relates to sex differences**. Pregnancy is the most obvious ground for that to be the case since only people with female reproductive organs can become pregnant.[116] Pregnancy discrimination by definition discriminates on the ground of the biological female sex, even if not all women are or ever will be pregnant and modern legislation on gender recognition makes it possible for some pregnant people to be

113 Fredman, S. (2018) 'Direct and Indirect Discrimination: Is There Still a Divide?' in Collins, H. and Khaitan, T. (eds) *Foundations of Indirect Discrimination Law*, (Oxford: Hart Publishing), pp. 31-55.

114 While rather progressive at the time regarding its approach towards transsexuality, the CJEU's approach towards discrimination related to sexuality and sexual orientation does not properly consider the gender dimension of sex discrimination. The recent US Supreme Court represent more current trends in this regard. See US Supreme Court *Bostock* v *Clayton County* No. 17–1618, decided 15 June 2020 together with No. 17–1623.

115 Judgment of 30 April 1996, *P* v *S and Cornwall County Council,* C-13/94, ECLI:EU:C:1996:170; recently confirmed in judgment of 26 June 2018, *MB* v *Secretary of State for Work and Pensions*, C-451/16, ECLI:EU:C:2018:492.

116 Judgment of 8 November 1990, *Dekker* v *Stichting Vormingscentrum voor Jong Volwassenen*, C-177/88, ECLI:EU:C:1990:383.

men.[117] However, the Court has also recognised **legally or practically created links that distinguish between men and women** and (formally) put them into a different situation. For example, if there is a difference between the female and male retirement age, differential treatment based on retirement age may constitute direct sex discrimination.[118] The Court applied a similar logic to sex distinctions that are not legally applied but imposed by undertakings themselves. For example, *Nikoloudi* was concerned with disadvantageous treatment of part-time cleaners. While this primarily appeared to be a case of indirect sex discrimination, the fact that the group entirely, not only disproportionally, consisted of women, led the Court to consider the case under the scope of direct sex discrimination as well. Specifically, it held that an occupational requirement may justify the employment of persons of only one sex. However, any subsequent discrimination of that group then constitutes direct sex discrimination.[119] Accordingly, a case is subsumed under the scope of direct sex discrimination if the criterion used is intrinsically linked to or 'indissociable' from sex[120] because of biological, legally or organisationally created sex differences. If we recognise this as an effects-based analysis, the difference between the concept of direct and indirect discrimination may only be that the former covers instances where the group that is disadvantaged by the measure consists entirely of members with a specific protected characteristic, while indirect discrimination covers instances where the group only disproportionately consists of people with a specific protected characteristic.[121]

However, there is a caveat to this distinction because **de facto effects** alone may not suffice to bring a claim under the scope of direct sex discrimination. It may so happen that an undertaking exclusively employs female part-time cleaners without excluding or refusing male applicants from working in the same job. Would that then mean that the detrimental treatment of the group automatically constitutes direct sex discrimination? Different arguments can be put forward in that regard. On the one hand, men are able to work as part-time cleaners, too. They are thus not excluded from the profession simply because an undertaking happens to employ female cleaners only. The link between sex and part-time cleaners is thus not definite and we should be careful to assume such a link. After all, there is nothing essentially female about part-time and/or work as a cleaner. On the other hand, a practice that disadvantages part-time cleaners is certainly not gender neutral as it is focused on a profession that is traditionally and uniquely female, even if not exclusively. For example, a Greek judgment has been criticised for dealing with cases where all but one of the workers were female under the scope of indirect rather than direct sex discrimination.[122] In *Nikoloudi*, the CJEU also struggled to determine the difference between direct and indirect discrimination, as it was uncertain whether part-time cleaning positions were exclusively available to women or whether male part-time cleaners had indeed worked in the position before.[123] Considering de facto trends under the scope of direct sex discrimination even if there are no specific occupational requirements that formally limits access to the position, may become even more convincing if this is a trend that can be observed throughout the Member State given the inequality it implies. Even if these effects are only obvious within one undertaking, one should at least be able to question the hiring practices. Certainly, the disadvantaging effects of a measure should be foreseeable if it excludes from benefits specific positions that are exclusively occupied by women. As such, it brings the action closer

117 In the original ruling the CJEU refers to 'women'. However, it is of course possible for transmen to become pregnant if they have changed their legal sex from female to male but retained their female reproductive organs. That should be sufficient to bring the case under the scope of sex discrimination. Subsequent case law on surrogacies (e.g. judgment of 18 March 2014, *Z.* v *A Government department* C-363/12, ECLI:EU:C:2014:159) has clarified that the CJEU indeed focuses on the reproductive capacity rather than legal sex or female gender identity in relation to pregnancy discrimination. While Article 2(2)(c) Recast Directive states that 'any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC' constitutes sex discrimination, it could possibly include legal men that have given birth and thus fall under the protection of the Pregnancy Directive.

118 Judgment of 18 November 2010, *Kleist*, C-356/09, ECLI:EU:C:2010:703; judgment of 17 May 1990, *Barber* v *Guardian Royal Exchange Assurance Group*, C-262/88, ECLI:EU:C:1990:209; However, they still have to be in the same situation otherwise, for direct sex discrimination to apply, see e.g. judgment of 9 December 2004, *Hlozek*, C-19/02, ECLI:EU:C:2004:779.

119 Judgment of 10 March 2005, *Vasiliki Nikoloudi* v *Organismos Tilepikoinonion Ellados*, C-196/02, ECLI:EU:C:2005:141.

120 Advocate General Jacobs, Opinion of 6 July 2000, *Schnorbus*, C-79/99, ECLI:EU:C:2000:370.

121 Khaitan, T. (2015) *A Theory of Discrimination Law,* (Oxford University Press), p. 160.

122 Greek Questionnaire to this report; **Greek** First Instance Civil Court of Athens (FICCA), No. 2323, 12.12.2018.

123 Judgment of 10 March 2005, *Vasiliki Nikoloudi* v *Organismos Tilepikoinonion Ellados*, C-196/02, ECLI:EU:C:2005:141.

to **intentional discrimination** which we may subsume more readily under the scope of direct sex discrimination.

However, intent is not required within direct or indirect discrimination and certainly cannot be used to distinguish between them. In principle, these cases remain within the scope of indirect sex discrimination because it would technically be possible for men to work part time, too, unless there are indeed barriers that make it impossible, such as occupational requirements or prior direct sex discrimination within the hiring process. The case may fall under the scope of direct sex discrimination if it can be demonstrated that the positions are excluded from the benefit because they are occupied by women. However, this will not always be the case and indirect sex discrimination can also be intentional, although it is of course not a necessary component. Intent can then be considered within the scope of the objective justification. National courts are thus required to consider the de facto legal and occupational situation within their Member State to ascertain whether the criterion is a proxy for sex or not. If, for example, parental leave was only granted to mothers, the disadvantages that flow from the leave and are recognised within the scope of EU non-discrimination law (see more on this below) should be treated as direct sex discrimination. However, as the CJEU distinguished between maternity and parental leave in that regard, it is not surprising that national courts have addressed this within the scope of indirect sex discrimination.[124]

However, the CJEU's expansion of **direct discrimination goes beyond criteria that are indissociable** from the protected ground and this has further confused the distinction between direct and indirect discrimination. This is most obvious within the context of discrimination based on civil status that falls outside the scope of EU sex discrimination law. In a number of cases, the CJEU was asked to assess measures that provided benefits in relation to marriage, which were open only to opposite-sex couples, but not to same-sex civil partnerships.[125] While one may be inclined to consider these cases under the scope of sex discrimination, as the sex of the partners determines the differential treatment, the CJEU made the distinction between sex and sexual orientation early on and EU legislation reflects this.[126] The cases were thus considered under the scope of sexual orientation only. Within that context, the question was whether a differential treatment based on civil status only constituted direct or indirect discrimination based on sexual orientation if marriage was only open to opposite-sex couples. Essentially, the Court held that matrimonial benefits that excluded same-sex civil partnerships constituted direct discrimination on grounds of sexual orientation if married couples and same-sex partnerships essentially were in the same situation regarding the purpose of the benefit. That the difference was then based on civil status rather than sexual orientation did not matter. The focus was thus on the similarity of the situations. The reference to civil status rather than sexual orientation directly was then considered sufficient since there was a link between the civil status and the sexual orientation of the partners involved.

However, there were good arguments to consider these cases under the scope of indirect discrimination on the ground of sexual orientation instead.[127] Specifically, one may want to consider that marriage benefits do not only exclude same-sex couples in civil partnerships but all caring relationships outside of marriage or civil partnership. The focus on similar situations within the context of direct discrimination then excludes the consideration of these groups, as they are not in a legally recognised union. Allowing such distinctions based on civil status (i.e. legally binding partnerships and single status) then leaves many groups unprotected, especially those who are not married or in a civil partnership, which includes

124 See for example Supreme Court **Latvia**, 9 Feburary 2015, Decision in case No.SKA-286/2005, available at https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/235739.pdf; Latvian Questionnaire to this report.

125 Judgment of 1 April 2008, *Maruko*, C-267/06, ECLI:EU:C:2008:179; judgment of 10 May 2011, *Römer*, C-147/08, ECLI:EU:C:2011:286; judgment of 12 December 2013, *Hay* v *Credit agricole mutual*, C-267/12, ELCI:EU:C:2013:823; judgment of 24 November 2016, *Parris*, C-443/15, ECLI:EU:C:2016:897.

126 Judgment of 17 February 1998, *Grant*, C-249/96, ECLI:EU:C:1998:63; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. OJ L 303, 2.12.2000, pp. 16-22.

127 Mulder, J. (2012) 'Some more equal than others? Matrimonial benefits and CJEU case law on discrimination on the ground of sexual orientation' 19(4) *Maastricht Journal of European and Comparative Law* 505; Mulder, J. (2018) 'Dignity or Discrimination: what paves the road towards equal recognition of same-sex couples in the European Union?' 40(1) *Journal of Social Welfare and Family Law* 129.

all homosexual couples in Member States that do not recognise same-sex partnerships. An assessment under the scope of indirect discrimination would have enabled us to consider to what degree distinctions based on civil status are apparently neutral measures, criteria or practices, that create a particular disadvantage within society as a whole, and whether they can be justified.

Moreover, in *Hay* the civil partnership law was indeed open to same-sex as well as opposite-sex couples. There was thus no indissociable link between the disadvantage and the protected ground; opposite-sex couples in a civil partnership were disadvantaged too, while the benefiting group exclusively covered opposite-sex married couples.[128] Translating this to the scope of direct and indirect sex discrimination, it would suggest that the indissociable link can relate to the disadvantaged or advantaged group only and that a perfect split along gender lines is not necessary. As long as 'marriage' is heterosexual only, any advantage linked to marriage but not provided to other legal partnerships constitutes direct discrimination on grounds of sexual orientation because it only ever advantages heterosexual couples. If we focus on the advantaged group only, the scope of direct sex discrimination is certainly extended. If it did not matter in *Hay* that the disadvantaged group was diverse and included homosexual and heterosexual couples in a civil partnership, why should it matter if a disadvantaged group included men and women, as long as the advantaged group exclusively consisted of members of one sex?

Yet, the understanding that direct discrimination can be established by reference to the homogeneous beneficial group only seems to contradict some of the previous CJEU case law on the **distinction between direct and indirect sex discrimination**. For example, in *Schnorbus* the Court treated different (beneficial) treatment on grounds of **compulsory military service** under the scope of indirect discrimination, although the conscription duty only applied to men.[129] Accordingly, the group of beneficiaries was exclusively male, but the disadvantaged group was more diverse and included women as well as men that were unaffected by the conscription duty. In a somewhat similar vein, in *Leone* the court considered a policy that awarded service credits for career breaks due to childcare under the scope of indirect discrimination, although by definition, it included all biological mothers on compulsory maternity leave while all other eligible childcare leave was voluntary and included in a less generous manner.[130] Both cases only make sense if we consider the policy as a whole and not each requirement separately. In *Schnorbus*, other requirements unrelated to sex could also trigger the beneficial treatment and in *Leone* other types of childcare leave could also be relevant for the calculation of service credits. Overall, men and women could thus benefit from the policy, but the specific challenged criteria were certainly not an 'apparently neutral criteria' and could have thus been considered separately. Compared to that, *Griesmar*,[131] the case preceding *Leone*, is indeed different, because the old French law entitled women to extra service credits for each child 'exclusively by reason of her status as mother' while *Leone* covered mothers and fathers on leave. The regulation in *Griesmar* thus simply assumed that all mothers bring up their children and suffer disadvantages because of it without considering the individual circumstances of each case, while fathers were not entitled to the additional service credits even if they took leave or were the primary carers for their children. Accordingly, the CJEU considered the law to perpetuate gender stereotypes contrary to direct sex discrimination. However, within the reasoning, the CJEU especially emphasised that the specific nature of the benefit was not related to maternity.[132] It thus does not follow from that case, that a service credit awarded because of maternity leave should be considered together with service credits awarded because of other types of leave, as suggested in *Leone*.

Disadvantages linked to leave including maternity leave are usually addressed under the scope of direct discrimination. For example, in *Thibault*, the Court considered measures that excluded those who were absent for more than six months in the relevant year from certain assessment procedures for the purpose of promotion. Unsurprisingly, the CJEU focused on the fact that the claimant's absence inter

128 Judgment of 12 December 2013, *Hay* v *Credit agricole mutual*, C-267/12, ELCI:EU:C:2013:823.
129 Judgment of 7 December 2000, *Schnorbus*, C-79/99, ECLI:EU:C:2000:676.
130 Judgment of 17 July 2014, *Leone*, C-173/13, ECLI:EU:C:2014:2090.
131 Judgment of 29 November 2001, *Griesmar*, C-366/99, ECLI:EU:C:2001:648.
132 Judgment of 29 November 2001, *Griesmar*, C-366/99, ECLI:EU:C:2001:648 para 53.

alia was due to maternity leave and thus considered it under the scope of direct sex discrimination.[133] However, the policy was drafted neutrally, applied to men and women alike, and could disadvantage men if they were absent from work for more than six months. Following *Leone*, a consideration under the scope of indirect sex discrimination thus seems to be more appropriate and this was indeed the understanding at the time.[134] The difference between *Leone* and *Thibault* then only seems to be that the former deals with a benefit, while the latter deals with a detriment.

The assessment essentially depends on whether the measures are assessed regarding their overall outcome, or whether each criterion is assessed separately. While pay cases usually give separate consideration to each element of pay,[135] in equal treatment cases the CJEU may be more willing to consider the policies as a whole. This highlights the importance of the correct frame of reference to determine which treatment applies to which group.[136] This can be illustrated with reference to some uncertainties at the national level. For example, a **Greek** points systems for accessing the fire brigade, the port police or special corps of the police that awards points dependent on the completion of voluntary military service could be considered as directly as well as indirectly discriminatory, depending whether we consider the different military positions separately or jointly. On the one hand, military service is in principle open to women although they have limited (de facto) access to it.[137] On the other hand, certain positions within the military service are exclusively accessible to men, and there used to be blanket exclusions in the past. Benefits regarding the latter can thus potentially be construed as direct sex discrimination. However, the national courts are likely to follow the CJEU decision in *Schnorbus* and assess and justify the provision under the scope of indirect sex discrimination despite there being good reasons to consider each requirement separately and address gendered criteria (such as conscription duties under *Schnorbus*) within the scope of direct sex discrimination. Regarding the latter, the Greek court simply held that the beneficial treatment compensated for the past disadvantage related to military service.[138] In a **Finnish** case, which concerned alleged discrimination by employers of young men who had not yet carried out military service, the Equality Ombudsman did not properly address the question of classification.[139] Rather, it simply stated that employers are not allowed to present questions concerning military service in a recruitment situation unless having carried out military service is relevant for the job in question. There are two possible scenarios. Disadvantages can flow from the expected future military service (e.g. it could impede access to permanent employment). As compulsory conscription only applies to men, this is likely to constitute direct sex discrimination as it addresses a situation similar to a refusal to hire women because of pregnancy and expected maternity leave. However, if the military experience is a criterion to access employment, it could be closer to indirect sex discrimination, because while compulsory conscription only applies to men, women can join voluntarily.

Schnorbus therefore raises some doubt about the **proper classification**. Whether something constitutes a case of direct or indirect sex discrimination can thus be somewhat uncertain. This is especially the case in areas where we can recognise the disadvantaging effect of a measure without reference to specific

133 Judgment of 30 April 1998, *Caisse nationale d'assurance vieillesse des travailleurs salariés* v *Thibault*, C-136/95, ECLI :EU:C:1998:178.

134 Moreau, M. A. (1994) 'Congé de maternité. Obstacle à la notation. Absence de discrimination, Cour de Cassation (Chambre sociale 20 Mars 1994 CNAVTS c/Duchemin)' 6 *Droit Social* pp. 561-562; Martin, Ph. (1996) 'Droit social et discriminations sexuelles: à propos des discriminations générées par la loi' 6 *Droit Social* pp. 562-568; Moreau, M. A. (1995) 'Egalité de traitement hommes/femmes congé de maternité. Absence de notation. Renvoi en interprétation de la directive du 9 février 1976' 4 *Droit Social* p. 1036; Lanquetin, M-T. (1995) 'La preuve de la discrimination : l' apport du droit communautaire' *Droit Social* 435; Lanquetin, M-T. (1998) 'Discriminations à raison du sexe. Commentaire de la directive 97/80 du 15 décembre 1997 relative à la charge de la preuve dans les cas de discriminations en raison du sexe' *Droit Social* 688.

135 Judgment of 17 May 1990, *Barber* v *Guardian Royal Exchange Assurance Group*, C-262/88, ECLI:EU:C:1990:209; Article 4 of Recast Directive 2006/54/EC referring to all aspects and conditions of remuneration. See for further discussion below 4.3.

136 See discussion below 4.3.

137 Judgment of 18 October 2017, *Kalliri*, C-409/16, ECLI:EU:C:2017:767.

138 EELN flash report (**Greece**) of 20 April 2020 'Indirect gender discrimination in access to seasonal firefighters', available at: https://www.equalitylaw.eu/downloads/5116-greece-indirect-gender-discrimination-in-access-to-seasonal-firefighters-118-kb; Council of State Judgment No. 1016/2015; Administrative Court of Athens, in its Judgment No. 2455/2015, made explicit reference to CS Judgment No. 1016/2015.

139 TAS 325/2012, 05.11.2012. **Finnish** Questionnaire to this report.

statistics concerned with the measure. Thus, in *Thibault* or *Schnorbus* it was obvious that women would suffer a disadvantage because of the measure, given compulsory maternity leave and exclusion from conscription duties. Similarly, given that women are more likely than men to work part time and to carry childcare responsibilities (including as single parents), any rules that disadvantage these groups should be suspect under the scope of sex discrimination, even prior to any specific statistical evidence concerned with the particular case. In these cases, the apparently neutral provision is also linked to the protected group. Direct as well as indirect sex discrimination law thus challenges criteria that are somehow linked to sex and whether it falls under one or the other sometimes seems to be a question of degree rather than form. With respect to indirect discrimination this becomes specifically obvious in the context of the qualitative reasoning, as further discussed below (chapter 5).[140] However, we should not lose sight of the fact that indirect discrimination can also challenge measures that seem entirely separate from the protected ground but nevertheless have a disadvantaging effect. Specifically, its focus on effects and (statistical) outcomes does not necessarily require an explanation of these effects or a demonstration that the disadvantage is indeed caused by something common to the protected group. The concept of indirect sex discrimination is thus much broader than the concept of direct discrimination. The correct classification is then important because the latter allows for a general objective justification while direct sex discrimination provides a closed list of possible justifications.

The correct distinction is nevertheless difficult in some cases. For example, *Re (E) v Governing Body of JFS* [2009] UKSC 15 sparked some controversy within **UK** academia,[141] as it classified an essentially religious dispute as direct race discrimination. The challenged practice concerned an admission policy to an Orthodox Jewish School that required students to be Jewish by matrilineal descent or by conversion in accordance with Orthodox Judaism. Jewishness was thus defined by reference to the mother's ethnicity. Because the claimant's mother had not converted to Judaism in accordance with Orthodox Judaism, the claimant was not considered to be Jewish. While the majority considered this to be a case of direct race discrimination because the refusal of admission was essentially based on the ethnicity of the mother and therefore the ethnicity of the claimant, the minority considered it a prima facia case of indirect race discrimination because an Orthodox religious understanding of Jewishness has a disadvantaging effect on groups with different ethnic origins.

Beyond cases that create obvious difficulties of classification, it remains difficult for courts to identify which criteria bear an intrinsic link with the protected characteristic and what concepts do not. Contrary to EU law, **Romanian** courts use intent to distinguish between direct and indirect discrimination and otherwise focus on causation. Indirect discrimination thus covers situations where there is no direct causation between the protected characteristic and the treatment. However, this did not stop them from assessing discrimination based on parental leave as direct (not indirect) sex discrimination because of the overwhelming number of women that take the leave.[142] A long-running case in **France** struggled with the assessment of disadvantages suffered upon the return to work after parental leave. In the case, a mother returning from parental leave was not assigned to her previous position as an accountant but instead was offered administrative and secretarial work unrelated to her employment contract. She was later made redundant due to economic reasons. Over the following 13 years, several Courts rejected her claim of moral harassment and pregnancy discrimination.[143] However, in 2019 the Court of Cassation partially quashed the Court of Appeal's finding that no sufficiently precise and consistent facts were produced to

140 See also judgment of 17 October 1989, *Handels- og Kontorfunktionærernes Forbund i Danmark* v *Dansk Arbejdsgiverforening* for *Danfoss*, C-109/88, ECLI:EU:C:1989:383, para 21; 'The position is different in the second case. If it is understood as covering the employee's adaptability to variable hours and varying places of work, the criterion of mobility may also work to the disadvantage of female employees, who, because of household and family duties for which they are frequently responsible, are not as able as men to organize their working time flexibly.'

141 Fredman, S. (2018) 'Direct and Indirect Discrimination: Is There Still a Divide?' in Collins, H. and Khaitan, T. (eds) *Foundations of Indirect Discrimination Law* (Oxford: Hart Publishing) pp. 41-45; McCrudden, C. (2011) 'Multiculturalism, Freedom of Religion, Equality, and the British Constitution' 9 *International Journal of Constitutional Law* 200.

142 **Romanian** Questionnaire to this report.

143 Court of Cassation, 4 July 2012, No. 11-17.986; Court of Cassation, 14 October 2015, No. 14-25.773; French Labour Code, Articles L. 1225-55 and L. 1.

presume pregnancy discrimination by reference to the framework agreement annexed to Directive 96/34/EC of 3 June 1996 and EU case law on both direct discrimination based on parental leave and indirect sex discrimination.[144] Specifically, it held that the Court of Appeal of Lyon should have considered whether the refusal to reemploy her in her initial position and instead offering her administrative tasks constitutes indirect sex discrimination, since a considerably higher number of women than men take parental leave.[145] The suffered disadvantage was thus addressed with reference to the parental leave rather than the pregnancy, which invited an assessment under indirect rather than direct sex discrimination.

The **French** Questionnaire to this report concludes:

> 'The focus of the final decision of the Court of Cassation on indirect "sex" discrimination and simultaneous reference to EU direct unequal treatment and indirect discrimination linked to parental leave case law rather than "pregnancy" discrimination and harassment showed the hesitation in flagging down intentional discrimination linked to parental leave. The Court of Cassation preferred to signal how indirect sex discrimination is perpetuated more often against women by creating apparently neutral individual barriers to the career advancement of women after parental leave.'

Poland's non-discrimination law in the context of employment requires the targeting of a group, not an individual. Accordingly, acts of indirect discrimination are acts of general character that disadvantage a group in which the majority or all members can be described by a given protected characteristic (e.g. sex). This narrows as well as broadens the concept of indirect sex discrimination. It is narrower because it requires a disadvantaged group that is indeed affected by the measure. Employers with very few employees or very little gender diversity will hardly be caught by the concept if the frame of reference is limited to the specific employer's actions and measures alone. On the other hand, it broadens the scope, as it also includes cases where all members of the disadvantaged group are of one sex. The latter would in many cases be considered direct rather than indirect discrimination, which would narrow the scope for possible objective justifications considerably. While one may only focus on the de facto effect in that context,[146] more specifically the question may be whether the criterion used is indeed a proxy for sex. A disadvantageous treatment of part-time workers may in many cases disadvantage only women within the undertaking. However, this does not necessarily mean that it is a direct proxy for sex, given that men can, and at times do, work part time.[147] A differential treatment based on retirement age on the other hand can be viewed as a direct proxy for sex if it predefines two separate groups, i.e. if the female and male retirement age is different. The **intrinsic link** is there because one can hardly capture the meaning and scope of retirement age without considering the protected characteristic, in this case sex.[148] The **Polish** Supreme Court however draws a different distinction.[149] It stated that the termination of the contract of a female employee only because she reached retirement age and acquired retirement rights if the retirement age is lower for women than for men, constitutes indirect discrimination on grounds of sex. Retirement age

144 Judgment of 22 October 2009, *Meerts*, C-116/08, ECLI:EU:C:2009:645; judgment of 27 February 2014, *Rogiers v Lyreco Belgium*, C-588/12, ECLI:EU:C:2014:99; judgment of 8 May 2019, *RE* v *Praxair MRC*, C-486/18, ECLI:EU:C:2019:379.

145 Court of Cassation, 14 November 2019, No. 18-15682.

146 This seems to be indeed the understanding of the UK Supreme Court. In *Essop and others* v *Home Office (UK Border Agency)* [2017] UKSC 27 [27] concerned with a test for promotion that produced disadvantaging outcomes for ethnic minorities, it held that the 'fact that some BME or older candidates could pass the test is neither here nor there. The group was at a disadvantage because the proportion of those who could pass it was smaller than the proportion of white or younger candidates. If they had all failed, it would be closer to a case of direct discrimination (because the test requirement would be a proxy for race or age).'

147 Judgment of 10 March 2005, *Vasiliki Nikoloudi* v *Organismos Tilepikoinonion Ellados*, C-196/02, ECLI:EU:C:2005:141 also discussed above; Fredman, S. (2018) 'Direct and Indirect Discrimination: Is There Still a Divide?' in Collins, H. and Khaitan, T. (eds) *Foundations of Indirect Discrimination Law* (Oxford: Hart Publishing) pp. 31-55.

148 Mulder, J., 'Vulnerability and indirect discrimination. Terminological bingo or rigorous conceptual separation within EU consumer law?' (forthcoming).

149 Polish Supreme Court judgment of 21 January 2009, II PZP 13/08.

was thus treated as an 'apparently neutral' criterion.[150] Direct discrimination thus only addressed direct gender-based destination, i.e. an employer applied the policy of terminating contracts once the employee reaches retirement age to women but not to men. Criteria that are intrinsically linked to sex are thus not recognised as such.[151] Retirement age can, however, only be an apparently neutral criterion if the male and female retirement age is the same, but the measure nevertheless disadvantages one sex group. For example, the **Norwegian** Ombud and Tribunal both considered termination upon reaching retirement age to fall under the scope of indirect sex discrimination because, although the retirement age was gender neutral, women suffered disadvantages compared to men due to the termination of their contracts upon reaching retirement age. While the Tribunal dismissed the case in the end, the Ombud highlighted that women will often be entitled to a much lower pension because of periods of non-contribution due to childcare. They are thus disadvantaged by automatic termination upon reaching retirement age.[152] The **French** Council of State on the other hand rejected such reasoning, although women de facto needed to pay contributions over longer periods if they were to benefit from a full pension. The Council of State discarded the relevance of the inequality in factual determination arising from women's more frequent interruptions of professional activity related to issues of care resulting in an increased number of years worked.[153] Following *Leone*, the French Council of State's reasoning has however evolved, as it now recognises that the additional allocation of service credits following maternity, adoption and parental leave can disadvantage men, but it was considered to be justified and proportionate as it compensates for the career disadvantages of women.[154] However, this reasoning focuses on specific measures that create different burdens only, rather than on de facto different benefits by equal application of the measures, as suggested by the Norwegian Ombud.

Other jurisdictions adopt a broad understanding of the intrinsic link. For example, the **Dutch** Hague Appeal Court considered disadvantages flowing from a resignation and return to work a year later within the context of breastfeeding under the scope of direct sex discrimination.[155] The court reasoned that the employee was forced to resign because of the breastfeeding and thus for reasons related to early motherhood directly related to sex. It thus adopted the reasoning related to pregnancy discrimination,

150 This seems contrary to established CJEU case law. See for example, judgment of the Court of 17 May 1990, *Barber*, C-262/88, ECLI:EU:C:1990:209; judgment of 18 November 2010, *Kleist*, C-356/09, ECLI:EU:C:2010:703; judgment of 26 March 2009, *Commission* v *Greece*, C-559/07, ECLI:EU:C:2009:198. For further discussion and references see Renga, S., Molnar-Hidassy, D. and Tisheva, G. (2010) *Direct and Indirect Gender Discrimination in Old-Age Pensions in 33 European Countries* (European Commission, European network of legal experts in gender equality and non-discrimination), especially footnote 20.

151 Similar uncertainties seem to exist within other jurisdictions. For example, the **Slovakian** Supreme Court (Judgment of September 2009, File No. 2 Cdo 183/2008) classified a removal of a deputy director from her post and a decrease of salary that followed her announced pregnancy to constitute indirect rather than direct sex discrimination.

152 Norwegian Equality and Anti-Discrimination Ombud, Decision of 29 April 2014, https://www.ldo.no/arkiv/klagesaker/2014/131307-Diskriminering-pa-grunn-av-alder-og-kjonn.

153 Hennette-Vauchez S., E. Fondimare E. (2019) 'The French Republican model and Anti-discrimination Law? Deconstructing a Familiar Trop of Narratives of French Law', in Havelkova B., Möschel M. (eds) *Anti-Discrimination Law in Civil Law Jurisdictions*, (Oxford University Press).

154 Council of State (Conseil d'Etat), No. 372426, 27 March 2015, Quintanel, n° 372426: The **French** Questionnaire to this report states: 'Following the CJEU decision in July 2014 (Case C-173/13 *Leone and Leone*), the Council of State reached an unexpected decision (27 March 2015, Quintanel, No. 372426). As in the *Leone* case, the decision concerned a service credit, which is determined over four quarters and awarded for the calculation of the pension of any civil servant, for each child born or adopted prior to 1 January 2004, or fostered before that date and nurtured for at least nine years, provided that the civil servant can demonstrate that he or she has taken a career break for a continuous period of at least two months, in the form of maternity leave, adoption leave, parental leave, parental care leave or leave in order to be available to bring up a child of less than eight years of age. The Council of State used the same terms as the CJEU to identify the disparate impact of the rule but stated that, if the CJEU could provide guidance to enable the national court to give a judgment, it is exclusively for the national judge to determine whether and to what extent the national provisions could be justified by a legitimate social policy. The Council of State then proceeded to analyse the justification for and the proportionality of the measure at stake. The French Government considered that the scheme reflected a legitimate aim, as the purpose of the service credit in question was to compensate for the career-related disadvantages resulting from career breaks for reasons of birth, the arrival of an adoptive child in the home, or the raising of children. The CJEU rejected this argument, notably because maternity and adoption leave are accompanied by the maintenance of acquired pension and promotion rights. However, according to the Council of State, even if women maintained their pension and promotion rights during maternity leave, the fact remains that women with one or more children progress more slowly in their careers than men, and their pensions are lower.'

155 The Hague Appeal Court, 22 February 2008, JAR 2008/90; Equality Tribunals case 34/2015 eventually dismissed the substantive finding of the Ombud.

although the disadvantage did not directly relate to maternity but to breastfeeding, not all new mothers would experience the disadvantage, and the disadvantage was directly linked to the resignation.

4.2 Comparability of situations

For indirect discrimination law to recognise de facto difference, it cannot fully embrace a comparator approach often (but not always) prevalent within the scope of direct discrimination. After all, measures, criteria and policies have a different effect on different groups precisely because they are in a different situation and therefore in one way or another distinguishable. Part-time workers work fewer hours than full-time workers, workers on parental leave are not on active duty for a specific period of time, and workers with childcare responsibilities may be less flexible depending on the employer's definition of flexibility. Nevertheless, disadvantaging these groups can constitute indirect sex discrimination if there is a 'particular disadvantage' and no objective justification. To determine the former, we need to choose a correct pool of comparators, but that pool of comparators is not selected by (potentially arbitrary) criteria that puts them in the same situation or not, but by reference to the measure, criterion or policy in question. Thus, those affected by it, whatever situation they find themselves in, need to be included in the comparison. Once we turn to objective justification, the question is not so much whether the groups are indeed in the same situation but whether the distinction drawn is appropriate and necessary to achieve the legitimate aim. Similarities and differences between the groups may be weighed in the assessment, but only play a part in relation to the legitimate aim. For example, in *Kachelmann*, the Court accepted that the difference in working time of part-time and full-time workers was relevant considering the purpose of the rules aiming to achieve socially reconcilable dismissal and their separate consideration could thus be justified.[156]

Unfortunately, there are a few cases that suggest the Court's willingness to consider the comparability or similarity of situations as a prerequisite for a claim context of indirect discrimination rather than as part of the objective justification. Similarly, national courts at times dismiss the relevance of 'particular disadvantages' that are demonstrated by statistical means because of a lack of comparability.[157] *Wippel* concerned an on-call worker, whose contract did not provide any weekly working time, who claimed back pay stipulating that she was treated less favourably than part-time and full-time employees with a contractually agreed weekly working time.[158] ÖGB concerned the calculation of redundancy payments based on length of service (seniority) that included (compulsory and non-compulsory) service in the armed forces but did not include periods of parental leave.[159] *Gruber* concerned termination pay that was given to employees who left work for important reasons but did not subsume leaving employment because of lack of childcare under the scope of 'important reasons'.[160]

In all three cases, the CJEU rejected the comparability of the two groups as they were in different situations. It is not entirely clear why it did not deal with that in the context of the objective justification within the narrow parameters outlined further below. Certainly, these cases return to an overly formal understanding of equality that leaves little scope for the concept of indirect sex discrimination despite the gender dimension being obvious. For example, ÖGB's distinction between military service and parental leave reflects the public/private divide commonly criticised by feminist scholars; the CJEU considered military service to be a public duty but viewed parental leave as a private choice without further considering the effects of the 'apparently neutral criterion'. Under the scope of the objective justification, one may wonder whether such reasoning indeed is unrelated to the protected sex, if it draws such a crude line between different reasons for being absent from work that are so clearly gendered. Moreover, in *Gruber*, the CJEU concluded that the claimant, who left her employment because of lack of childcare, was not in

156 Judgment of 26 September 2000, *Kachelmann*, C-322/98, ECLI:EU:C:2000:495 paras 32-34.
157 **Belgium** Constitutional Court, judgment No. 51/2008 of 13 March 2008. All judgments of the Constitutional Court are available in French, Dutch and German at www.constitutional-court.be.
158 Judgment of 12 October 2004, *Wippel*, C-313/02, ECLI:EU:C:2004:607.
159 Judgment of 8 June 2004, Österreichischer Gewerkschaftsbund, C-220/02, ECLI:EU:C:2004:334.
160 Judgment of 14 September 1999, *Gruber*, C-249/97, ECLI:EU:C:1999:405.

a similar situation to workers who left work because of other 'important reasons', because the reasons generally considered to be important under the provision were generally related to working conditions or employer behaviour, while Ms Gruber's predicament was not caused by the employer. However, that seems irrelevant for the establishment of the 'particular disadvantage'. After all, the limited approach towards 'important reasons' was the subject of Gruber's challenge. Thus, Ms Gruber did not question that the current provision did not include her situation but argued that the narrow scope disadvantages women, as they are more likely to leave work because of lack of childcare. While there may have been good reasons for their exclusion, given that childcare provisions were not considered to be the employers' responsibility in the case,[161] these questions should be addressed within the objective justification.[162]

Accordingly, the different situation of the disadvantaged group does not exclude the application of indirect sex discrimination law but can be relevant within the context of the objective justification. This has been confirmed numerous times. To name only two cases, in *Nikoloudi* the Court found that the different treatment of temporary part-time cleaners and other full-time workers constitutes indirect discrimination (unless justified), although there is a clear difference between temporary and permanent staff.[163] Differences between comparable groups are also not relevant once it is established that they perform equal work or work of equal value. In *Leone*, the CJEU implicitly rejected AG Jääskinen's assessment that indirect discrimination required the male and female workers to be in a similar situation.[164] Specifically, the AG had argued that there was no indirect (or direct) discrimination because fathers and mothers who have taken career breaks to take care of their children were not comparable with those who have not. Moreover, the AG considered that maternity leave – and the benefits related to it – could not constitute discrimination. However, the CJEU concluded that this was a case of indirect sex discrimination and questioned its justification, although the final decision was left to the national court. While the CJEU could have possibly considered the differences between the groups in question in the context of objective justification, it clearly rejected the need for comparability or similarity of situations as such. Similarly, the **French** Court of Cassation stated that 'the existence of discrimination does not necessarily require a comparison with similarly situated workers.'[165] The case concerned an undocumented domestic worker who was in no way in a comparable situation to a domestic French worker who can be protected by labour law and can contest an unjust dismissal. The court invoked 'exploitation' as the disadvantage and considered that her employer took advantage of her apparently neutral status as an illegal alien to fire her without cause, anticipating that she would not dare bring a claim.

This seems to be the correct conclusion. In fact, indirect sex discrimination's focus on results specifically highlights the detrimental effect of measures, criteria and practices on groups that are in different situations. After all, the 'apparently neutral' measure does have a different effect on different groups, because they are in different situations. A similar situation test should thus not precede an assessment under the scope of indirect sex discrimination. To the degree the differences between advantaged and disadvantaged groups remain relevant, they should be considered within the scope of the objective justification only.

4.3 Establishing a 'particular disadvantage'

A case of (prima facie) indirect sex discrimination can be established if an 'apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex'. This definition raises a number of issues and uncertainties that have required further elaboration within the case law. We will consider them in turn.

161 It is of course not always possible to separate childcare facilities from the responsibility of the employer, as many employers indeed provide childcare facilities. See e.g. judgment of 19 March 2002, *Lommers*, C-476/99, ECLI:EU:C:2002:183.
162 See section 4.4.1 below.
163 Judgment of 10 March 2005, *Vasiliki Nikoloudi* v *Organismos Tilepikoinonion Ellados*, C-196/02, ECLI:EU:C:2005:141.
164 Judgment of 17 July 2014, *Leone*, C-173/13, ECLI:EU:C:2014:2090.
165 Court of Cassation, 3 Nov. 2011, No. 10-20765.

4.3.1 What is a disadvantage?

In many cases a disadvantage will be easy to identify. Simply put, the disadvantaged group is worse off. Most commonly, difficulties arise with respect to the identification of the groups to be compared for the purpose of identifying the disadvantaged group, rather than with respect to the question whether something constitutes a disadvantage in the first place. However, at times it may be difficult to determine whether the identified differences between the groups indeed constitute a disadvantage. This could be the case because one may be inclined to recognise additional practices to compensate for the alleged disadvantage or because the difference in treatment directly relates to the difference in actions (e.g. working time). While the former requires us to consider the frame of reference in more detail (see below), the latter very much focuses on what constitutes a disadvantage per se.

The CJEU has explored this within the context of **part-time work**. Specifically, it has consistently held that the application of the *pro-rata temporis* principle does not constitute a disadvantage if it is concerned with remuneration based on working time.[166] Accordingly, part-time workers' pay can be reduced (compared to full-time pay) according to their contractual working hours. This at first seems uncontroversial; full-time workers get paid more because they work more hours, but each hour of work is compensated the same.[167] However, as we see below, the *pro-rata temporis* approach is not always convincing and must be rejected within the context of equal treatment cases and depending on the nature of the pay.

Benefits under **statutory social security schemes** can differ as long as they reflect the difference in working time, but additional reductions constitute a disadvantage.[168] This also excludes reductions that relate to the time and place the work is completed. For example, the Court has rejected reductions that related to the worker not working every day of the week (so called vertical part-time workers).[169] However, the strict compliance with the *pro-rata temporis* principle can create some odd results if it is applied to a system that is based on contributions. Specifically, this is the case regarding pensions or unemployment protection that fall under the scope of pay or the scope of the Social Security Directive 79/7/EEC where the benefit relates to the prior contributions made or overall income and not the specific hourly pay within a contract of work at a specific place of work. This has been an issue in a recent case, *Plaza Bravo*, on the calculation of Spanish unemployment benefits for part-time workers. The unemployment scheme in question was first calculated based on annual income and then reduced taking into account the general maximum (depending on the personal family situation) and adjusted by a reduction coefficient of 60 %, corresponding to the applicant's 60 % part-time working hours. The national courts pointed out that the part-time adjustment de facto means that a full-time employee in the same situation, earning the same salary and paying the same amount of social security contributions as the part-time worker, would receive higher monthly employment benefits than the part-time worker. Nevertheless, the CJEU held that the application of a *pro-rata temporis* principle cannot constitute a disadvantage while also pointing out that the overall calculation, imposing a general maximum, disadvantages full-time workers, as they are more likely to have higher earnings.[170] However, full-time workers with very low hourly salary may benefit in comparison with part-time workers with a higher hourly salary but the same annual income. Namely, the system's capped benefits are based on a combination of contribution and working time that seems to reduce some part-time workers' entitlements compared to that of some full-time workers without an obvious reason.

166 Judgment of 17 November 2015, *Plaza Bravo*, C-137/15, ECLI:EU:C:2015:771; judgment of 13 July 2017, *Kleinsteuber*, C-354/16, ECLI:EU:C:2017:539; judgment of 10 June 2010, *Bruno and Others*, C-395/08, ECLI:EU:C:2010:329. See also Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, OJ L 14, 20.1.1998, pp. 9-14.

167 Judgment of 31 March 1981, *Jenkins,* C-96/80, ECLI:EU:C:1981:80; judgment of 13 May 1986, *Bilka* v *Weber von Hartz,* C-170/84, ECLI:EU:C:1986:204.

168 Judgment of 8 May 2019, *Villar Láiz,* C-161/18, ECLI:EU:C:2019:382; judgment of 22 November 2012, *Elbal Moreno*, C-385/11, ECLI:EU:C:2012:746.

169 Judgment of 9 November 2017, *Espadas Recio*, C-98/15, ELCI:EU:C:2017:833.

170 Judgment of 17 November 2015, *Plaza Bravo*, C-137/15, ECLI:EU:C:2015:771.

Within **pay discrimination**, the *pro-rata temporis* principle creates difficulties once different hours of work are remunerated differently, for example because they take place at inconvenient times (shift work or weekends) or are in addition to the contractually agreed working time. As pay cases generally require the separate consideration of each element of pay,[171] one may be inclined to consider pay for regular working hours and pay for overtime separately. The CJEU has addressed this in a number of cases concerned with the different **remuneration for regular working hours and overtime**. In *Helmig*,[172] overtime rates were higher than for regular working hours, but only once they exceeded the weekly workload of a full-time worker. In *Voß*,[173] part-time teachers' overtime was remunerated at a lower rate than the full-time teachers' regular hourly pay. In both cases the regulation drew a distinction between regular hours and overtime. In *Helmig* regular hours were defined as hours regularly worked by full-time workers, not as the contractually agreed hours. In *Voß*, the contractually agreed hours of part-time workers were taken into account to their detriment. Accordingly, their extra (lower remunerated) work was classed as overtime, that was, 'the hours worked over and above [the] normal working hours, but not sufficient to bring the hours worked overall above the level of normal working hours for full-time staff.'[174] In both cases it would have been possible to identify a difference in remuneration for part-time and full-time workers depending on whether the pay and related working time was considered together or separately. The choice of perspective is thus crucial.

In *Helmig*, the discrepancy lay in the fact that working above the contractually agreed hours was not recognised as overtime as such. Nevertheless, the Court denied any disadvantage by reference to the pay in absolute terms. Accordingly, each hour worked was remunerated the same, i.e. a full-time and part-time worker working 40 hours a week received the same remuneration. This approach has been criticised thoroughly in the literature.[175] Specifically, these cases ignore the gender dimension underpinning part-time work and (domestic) responsibilities part-time workers often have outside work. While the CJEU dismissed these concerns with reference to the classic public and private divide, essentially stating that outside work responsibilities are irrelevant for the assessment, these additional hours worked are certainly not the same for part-time and full-time employees. After all, full-time employees know in advance that these hours will be included in their weekly work schedule and organise their life accordingly. Part-time workers can thus be burdened more heavily by these extra hours worked. One can come to that conclusion without reference to the many gendered reasons why workers take up part-time work (e.g. domestic care responsibilities that are difficult to reconcile with overtime), and instead focus on the contractually agreed working time itself. Overtime does not simply become an additional burden that deserves additional remuneration if it exceeds a specific total number of hours that is somewhat arbitrarily set, but is a burden because it goes beyond the contractual agreed time and inhibits planning security and reliability. Such an assessment would also break more clearly with the so called male norm, according to which full-time work is the standard while any other working time arrangements are considered atypical. Specifically, we would have to depart from the idea of regular (as in full-time) hours altogether and instead embrace the many different types of contractual arrangements that currently exist within the diverse labour markets of the Member States. This would allow for a more substantive assessment of the relationship between overtime and pay, notwithstanding that the direct comparison of each hour worked can benefit claimants if overtime is paid at a lower rate (as in *Voß*).

171 Judgment of 17 May 1990, *Barber* v *Guardian Royal Exchange Assurance Group*, C-262/88, ECLI:EU:C:1990:209.
172 Judgment of 15 December 1994, *Stadt Lengerich and Others* v *Helmig and Others*, C-399/92, ECLI:EU:C:1994:415.
173 Judgment of 6 December 2007, *Voß*, C-300/06, ECLI:EU:C:2007:757.
174 Judgment of 6 December 2007, *Voß*, C-300/06, ECLI:EU:C:2007:757 para 15.
175 See for example Costello, C. and Davies, G. (2006) 'The Case Law of the Court of Justice in the Field of Sex Equality since 2000' 43(6) *Common Market Law Review* 1567; Hervey, T. and Shaw, J. (1998) 'Women, Work and Care' 8(1) *Journal of European Social Policy* p. 54; Busby, N. (2018) 'The evolution of gender equality and related employment policies: The case of work–family reconciliation' 18 (2-3) *International Journal of Discrimination and the Law* 104; Burri, S.D. (2000) *Tijd delen. Deeltijd, gelijkheid en gender in Europees en nationaalrechtelijk perspectief*, dissertation, Utrecht University Europese Monografieën 66 Kluwer.

Lessons for such a substantive assessment[176] can be drawn from *Elsner-Lakeberg*.[177] The case was concerned with three hours of unpaid overtime a month for part-time and full-time teachers alike. The AG compared each hour worked and thus concluded that part-time workers had to be fully remunerated for their overtime as these hours were compared to the full-time teachers' regular hours. Instead, the CJEU considered regular pay and overtime separately. It then concluded that the fixed set of unpaid overtime disproportionally burdened part-time workers in relation to their contractually agreed working time. Namely, the claimant teaching 15 hours a week had to work 5 % more hours in order to get paid for overtime whilst a full-time teacher teaching 24.5 hours a week only had to work 3 % more. There was thus a focus on the relative burden on part-time workers considering their contractually agreed working time.

The distinction between *Helmig* and *Elsner-Lakeberg* as set out in *Voß* is not at all clear. Presumably, the Court distinguished between an absolute difference in the amount of regular and overtime pay and a relative burden of some unpaid work before one is entitled to an overtime supplement. However, it is not obvious why the latter would prevent an hour to hour comparison in terms of pay or vice versa. Nevertheless, the distinctions drawn in the case law have been embraced by some Member States. For example, the **Swedish** Working Hours Act (1982:673) makes a difference between overtime work and so-called 'more time' work, and collective agreements often remunerate each differently. **Greek** law recently amended its approach to *pro-rata temporis* and provides that every extra hour over the contractual hours should be paid at the rate of the hourly wages plus 12 %; moreover, extra hours can be performed only up to the regular hours of a full-time worker.[178] **French** cases have also shown that overtime for part time workers (hours above normal working hours but not sufficient to amount to full-time work) is not always remunerated as highly as overtime for full-time workers.[179] Similar issues can arise regarding other wage supplements.[180] Older **German** case law distinguishes between *Helmig* and *Voß* and the general *pro-rata temporis* approach, as it does not consider the relative entitlements in relation to the working time.[181] However, in 2018, the Federal Labour Court changed its approach with reference to the *pro-rata temporis* principle. A provision that only entitled workers to overtime once they exceed the regular full-time hours was thus viewed as contrary to Section 4(1) of the Part-Time and Fixed-Term Employment Act 2000. Specifically, the Court held that each individual component of remuneration should be compared separately as this is more closely aligned with the prohibition of discrimination of part-time workers as well as with the prohibition of pay discrimination on the ground of sex under the Pay Transparency Act.[182] It is also more in line with the general requirement to consider each element of pay separately.[183] Other courts continue within the logic of *Helmig* and *Voß*. The Labour Court of Munich accepted a staggered pay policy, in which higher hourly remuneration was linked to the achievements of certain fixed working hours per month. Specifically, it distinguished between remunerating for additionally performed working hours and compensation for the increased workload of employees with the aim of preventing the employer from making excessive demands on the employees.[184] This begs the question why part-time workers should not be compensated and protected in the same manner as full-time workers.

A substantive assessment thus seems somewhat more convincing as it departs from distinguishing between typical full-time contracts that are more likely to be occupied by men and thus exemplify the (male) full-time norm, and atypical part-time contracts, and instead considers the relative burden in relation to the contractually agreed hours. Specifically, it considers the relative burden of each group of

176 Arnull, A. (2006) *The European Union and its Court of Justice* (2nd edn, Oxford University Press) p. 578.
177 Judgment of 27 May 2004, *Elsner-Lakeberg*, C-285/02, ECLI:EU:C:2004:320.
178 I.e. 8 hours per day, 40 hours per week with some exceptions in certain branches, e.g. banks 37.5 hours per week. Article 38(11) Act 1892/1990, as amended by Article 59, Act 4635/2019 (OJ A 167/30.10.2019).
179 Court of Cassation, 7 December 2010, No. 09-42315.
180 Equal treatment for bonuses for vacations or for the end of the year, Court of Cassation, 26 February 1997, No. 95-43030 or compensation for housing in certain areas, Court of Cassation, 1 June 1999, No. 97-41430.
181 See further discussion in Mulder, J. (2017) *EU Non-Discrimination Law in the Courts* (Hart Publishing) p. 211.
182 Federal Labour Court, 10th Senate, judgment of 19 December 2018, 10 AZR 231/18, para 58 ff., following the 6th Senate of the Federal Labour Court, judgment of 23 March 2017, 6 AZR 161/16.
183 Judgment of 17 May 1990, *Barber* v *Guardian Royal Exchange Assurance Group*, C-262/88, ECLI:EU:C:1990:209 para 35.
184 State Labour Court of Munich, judgment of 19 November 2019, 6 Sa 370/19.

workers, without the need to consider whether they are indeed in the same situation regarding the specific benefit or not. Simply distinguishing between the full-time norm and part-time hours is thus deceptive. In line with that, additional pay that is provided for irregular hours (e.g. shift work or weekends) should in principle be available to part-time workers, too, given that their reduced weekly working hours do not change the inconvenience.[185]

The *pro-rata temporis* principle is not adopted within the context of equal treatment including **compensatory measures**. For example, compensation for travel costs will have to relate to the actual costs and not the numbers of hours worked. Similarly, compensatory measures for training courses have to be in principle compensated based on the actual hours of the training course, not the contractual hours. This was an issue in *Bötel*[186] and *Lewark*.[187] Both cases concerned part-time workers who attended a training course for work council activities that were held during full-time working hours. As legally required, the employers compensated them for the time spent according to their contract but not for the hours actually spent at the training course. The claimants argued that they experienced a disadvantage, because they would have received full compensation if they had worked full time. While one may view this as an equal treatment case, as the compensation does not concern remuneration for work and does not directly flow from the employment contract, the CJEU nevertheless considered it under the scope of pay, as it was paid by the employer and required employment. Accordingly, it is unsurprising that the CJEU did consider part-time workers to be entitled to remuneration for the full time spent at the training course. After all, the CJEU views this as a compensation akin to remuneration for attending the training course, rather than a compensatory measure for absence from work. This understanding was highly criticised by the German Federal Labour Court in *Lewark*, as it seems to ignore the voluntary nature of work council activities that are performed on an honorary and unpaid basis. The compensatory measure only ensured that the employee would not lose pay because of work council activities. There is some suggestion that this dialogue with the national court then led the CJEU to accept a broader margin of objective justification.[188] While the Court continued to consider these cases under the scope of equal pay, it did accept that particular disadvantage can possibly be justified because of the specific nature of work council activities, the independence of work council members, and the need to avoid financial inducement, all of which play a part in German social policy. However, it also highlighted that lack of full compensation for time spent may hinder accessibility for part-time workers. It has been said that that reasoning is 'inherently illogical' as it suggests that unequal pay can be justified by the fact that the compensation does not constitute pay.[189] As such, the case might have been better treated as a case of equal treatment.

In **equal treatment cases**, a general assessment of the situation seems to be much more common. Accordingly, part-time workers are entitled to the same work conditions, e.g. regarding annual leave, even if they work fewer monthly or weekly hours.[190] Relative burdens can also be relevant outside the scope of pay discrimination. For example, in *Kachelmann*, the CJEU assessed the German redundancy legislation that required the consideration of 'social reasons' when selecting employees for redundancy (i.e. the individual circumstances of employees) but denied the comparability of full-time and part-time workers for this purpose. While the court considered full-time and part-time workers to receive the same advantageous or disadvantageous treatment according to whether in each particular case it is a full-time post or a part-time post which is being abolished, it did consider that the rule burdened part-time workers considerably more, because of the significantly higher number of available full-time positions within Germany. Accordingly, part-time workers losing their work were at a greater disadvantage because they

185 **Dutch** Equal Treatment Commission, opinion 2012-134: https://mensenrechten.nl/nl/oordeel/2012-134 has adopted this approach although additional consideration regarding the different rights under the contracts may alter that assessment (see below).
186 Judgment of 4 June 1992, *Bötel*, C-360/90, ECLI:EU:C:1992:246.
187 Judgment of 6 February 1996, *Lewark*, C-457/93, ECLI:EU:C:1996:33.
188 Kilpatrick, C. (2001) 'Gender Equality: A Fundamental Dialogue' in Sciarra, S. (ed) *Labour Law in the Courts: National Judges and the European Court of Justice* (Hart Publishing) pp. 31-130.
189 Ellis, E. and Watson, P. (2012) *EU Anti-Discrimination Law* (2nd edn, Oxford University Press) p. 243.
190 See for example the **French** Court of Cassation, 13 November 2008, No. 07-43126.

had less chance of finding another comparable job.[191] In addition to that, the legislation could also create a higher relative burden because if there are fewer part-time workers in the particular undertaking, part-time workers' individual circumstances are compared within a smaller pool of workers, making it more likely for an individual part-time worker to be selected for redundancy.

A general view on equal treatment may also encourage courts to consider compensatory measures that balance out the disadvantage. In a **French** case on age discrimination, a woman tried to challenge her redundancy as the dismissal procedures only included senior but not junior advertising managers. However, the Court of Cassation rejected the disadvantage, as most senior advertising managers were protected from dismissal due to their seniority.[192] Whether this itself constituted indirect sex discrimination was not considered.

4.3.2 Frames of reference

To establish a case of indirect sex discrimination it is important to determine the correct frame of reference. Specifically, it is necessary to consider who is responsible for the detrimental effect and who should be included in the pool of comparators to establish a 'particular disadvantage'. Beyond that, it may at times make sense to consider nationwide trends even if the measure concerned only applies to a specific undertaking or those who come under a specific collective agreement. For example, to establish a 'particular disadvantage' regarding measures on parental leave, it is relevant whether the overwhelming number of people within the Member States who take parental leave are female, even if the same imbalance is not equally obvious within the specific sector or undertaking. Similar considerations can be made with respect to disadvantages linked to part-time work.

The CJEU has upheld a **'single source' requirement**, that is a requirement that the unequal treatment stems from one source that can restore equal treatment. For example, in *Lawrence*, catering and cleaning staff challenged a difference in pay first against the Council and, following a transfer of undertaking, against the respondent undertaking. The first case of indirect sex discrimination was successful in the House of Lords, as the cleaning and catering services, which were most commonly provided by women, were deemed of equal value to gardening services, which were most commonly provided by men. The Council was thus required to increase the pay of the cleaning and catering staff still employed by the Council. However, when the Council contracted out catering and cleaning services to the respondent undertaking, following a competitive tendering process as required by the Local Government Act 1988, the undertaking recruited a number of female staff originally employed by the Council at rates of pay lower than those paid by the Council prior to the transfer of activities. They also recruited new female staff.

The CJEU recognised that the work the claimants performed for the undertaking was identical to the work previously performed for the Council and that the cleaning and catering services had been and continued to be recognised as being of equal value to that performed by the chosen comparators (gardening services) employed by the Council. Nevertheless, the CJEU rejected that the situation fell under the scope of Article 141(1) EC (now Article 157 TFEU), because, given the transfer of undertaking, the claimants and the comparators worked for different employers. As later in *Allonby*, the CJEU made it clear that there can be no discrimination if the differential treatment is not controlled by the same source (e.g. the employer) and there is thus nobody who can restore equality.[193] Accordingly, if certain groups performing work of equal value or part-time workers are not employed by the same employer (e.g. because they are 'outsourced' and employed by an agency instead), fall under the same collective agreement or somehow have another common denominator, they cannot be included in the assessment of the indirect sex

191 Judgment of 26 September 2000, *Kachelmann*, C-322/98, ECLI:EU:C:2000:495 paras 26-27.
192 Court of Cassation, 19 October 2010, No. 08-45254.
193 Judgment of 17 September 2002, *Lawrence and Others*, C-320/00 EU:C:2002:498, ECR I-07325; judgment of 13 January 2004, *Allonby*, C-256/01 EU:C:2004:18, [2004] ECR I-00873.

discrimination even if they work in the same premises doing the same or equal value work and previously worked for the same employer. After all, 'if differential treatment cannot be attributed to a single source, there is no body which is responsible for the inequality and which could restore equal treatment.'[194]

A strict adherence to this approach can significantly reduce the effectiveness and scope of the concept of indirect sex discrimination within modern workforces that include quite a number of work arrangements that fall outside of regular employment (e.g. agency workers, quasi-independent workers, platform workers). A broader perspective may lead us to conclude that these 'outsourcing decisions' themselves are discriminatory. If employers refuse to hire some workers directly (e.g. part-time workers or those in specific roles, such as cleaners or catering staff) but only engage them under these subsidiary conditions, women will face more difficulties in entering the employment market under equally beneficial conditions. These issues were not considered in detail by the CJEU, because in *Lawrence*, the Court of Appeal did not ask about rules on transfers of undertakings[195] and in *Allonby* the redundancy claim was settled. Nevertheless, outsourcing decisions that only affect certain groups of workers would seem to be relevant in indirect sex discrimination cases it the concept is intended to address de facto disadvantages and recognise the structural disadvantages experienced by women. Specifically, the narrow scope of Directive 2008/104/EC on temporary agency work that is aimed at ensuring that temporary agency workers receive basic work and employment conditions, in relation to working hours, overtime, breaks, pay and holidays, is unable to appreciate the interlinked web of disadvantages experienced by disadvantaged groups, as it is based on a worker's status as an agency worker rather than linked to the protected personal characteristic. The Directive addresses only the difficulties with the single source requirement in relation to agency workers, while the requirement's narrowing effect goes beyond that. A more systematic analysis of the employment market or specific sectors can thus reveal systemic or structural gender disadvantages that are not immediately obvious from a narrow focus on a single source.

The single source requirement can also create difficulties within the gig economy, as these quasi-self-employed workers often do not work under a contract of employment and it is not always clear that there is a specific body that can address the potential discriminatory conduct and restore equality. EU non-discrimination law may thus face significant challenges in remaining relevant within this ever-expanding work sector that provides so many different services.[196] The single source criterion in particular expresses the desire that there needs to be a 'body which is responsible for the inequality and which could restore equal treatment.'[197] Regarding agency workers, the question remains to what degree the employer running the undertaking in which the agency workers work (user undertaking) can indeed restore equal treatment. While the Temporary Agency Workers Directive views temporary-work agencies as the employer and thus bound to meet their employer obligations,[198] the fact remains that the temporary worker usually exercises her working activities under the direct supervision of the user undertaking and not the agency.[199] Moreover, the user undertaking's working conditions define the scope of employment and working conditions that the temporary agency worker is entitled to during the time of the assignment, including the rules, practices and entitlements regarding pregnancy and maternity and equal treatment of men and women.[200] Moreover, *Allonby* and *Lawrence* confirm the finding in *Defrenne* that there is nothing in the wording of Article 141(1) EC (now Article 157 TFEU) that limits its scope to men and women working for the same employer. Rather collective agreements as well as in cases in which work is carried

194 Judgment of 17 September 2002, *Lawrence and Others*, C-320/00 ECLI:EU:C:2002:498 para 18; judgment of 13 January 2004, *Allonby*, C-256/01 ECLI:EU:C:2004:18 para 46.
195 Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, OJ 1977 L 61, p. 26.
196 See for example https://www.helpling.com/. Further discussion in chapter 6, below.
197 Judgment of 17 September 2002, *Lawrence and Others*, C-320/00, ECLI:EU:C:2002:498 paras 17-18; judgment of 13 January 2004, *Allonby*, C-256/01 ECLI:EU:C:2004:18 paras 45-46.
198 Article 2 Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ L 327, 5.12.2008, pp. 9-14.
199 Frenzel, H. (2010) 'The Temporary Agency Work Directive' 1(1) *European Labour Law Journal* 119.
200 Article 5 Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ L 327, 5.12.2008, pp. 9-14.

out in the same establishment or service, whether private or public, can be addressed under its scope.[201] Within the context of indirect sex discrimination we need to specifically determine who can be included to demonstrate the 'particular disadvantage' and who falls outside the scope of the measure, criterion or practice that is being challenged.

The understanding is also prevalent within the national context. For example, the **French** Questionnaire to this report states:

> 'Indirect discrimination is considered as stemming from either a provision in a single statute, a criterium in a specific clause of a particular bargaining agreement, a specific practice by an employer related to a guideline, a single act and not derived from different branches of the same company, of different companies or of different types of contracts (public and private sector of the same company). Even though it is the disproportionate impact of the rule that prevails, all cases enforce the 'single source' requirement to determine what pool of workers are affected.'

In practice, the single source requirement distinguishes different groups within the same company. Accordingly, the **French** Court of Cassation rejected an argument that pointed to the fact that, in the case at hand, women within the company in question were mostly offered temporary work, while men were employed on permanent contracts, because the claim was based on both private and public sector contracts although it should have concerned only private contracts because the recruitment rules are different.[202] Nevertheless, they did indeed work for the same employer who could restore equality. This thus includes broader considerations regarding the frame of reference that go beyond the question of the single source and seem somewhat closely aligned with the comparability of situations.

However, separation of legal structures or different collective agreements may not always exclude a comparison between workers in different undertakings, even if a strict single source requirement is upheld.[203] For example, the **Polish** Supreme Court has emphasised that 'a comparison of the legal situation of employees under Article 112 LC [Polish Labour Code] can take place only with respect to the same employer. (...) It is not possible for an employee to pursue claims for violation of the principle of equal treatment in employment based on comparing his actual and legal situation with the situation of an employee employed by another employer, especially if he is a separate legal entity.'[204] Nevertheless, it later recognised that 'in the case of abuse by the parent company of the structure of legal personality, the assessment of violation of the principle of equal treatment in employment (Article 112 and Article 18 § 3 LC) may be made by comparing the situation of an employee of the employer being a subsidiary company (Article 3 LC) with the situation of employees of the parent company.'[205] Specifically, it was deemed relevant whether the entity has full economic and financial independence and whether it depends on the company's decision.

Accordingly, the **correct pool of comparators** depends on the individual circumstances of the case. As explored above,[206] indirect sex discrimination differs from direct discrimination in that it does not require the comparators to be in a similar situation as such. However, the single source requirement can inform it. Simply put, the pool of comparators includes all that are affected (either by benefiting or being disadvantaged) by the provision, criterion or practice.[207] Generally, that means that there should be a

201 Judgment of 17 September 2002, *Lawrence and Others*, C-320/00, ECLI:EU:C:2002:498 para 17; judgment of 8 April 1976, *Gabrielle Defrenne* v *Société Anonyme Belge de Navigation Aérienne Sabena* (*Defrenne II*) C-43/75, ECLI:EU:C:1976:5 para 40; judgment of 27 March 1980, *Macarthys*, C-129/79, ECLI:EU:C:1980:103 para 10; Judgment of 31 March 1981, *Jenkins,* C-96/80, ECLI:EU:C:1981:80 para 17.

202 Court of Cassation, 22 Oct. 2014, No. 13-16936.

203 As already held in CJEU judgment of 27 October 1993, *Enderby* v *Frenchay Health Authority and Secretary of State for Health*, C-127/92, ECLI:EU:C:1993:859.

204 Supreme Court judgment of 15 November 2013, III PK 20/13, OSNP 2014 No. 10, item 143.

205 Supreme Court judgment of 18 September 2014, III PK 136/13.

206 See section 4.2 above.

207 Judgment of 30 November 1993, *Kirsammer-Hack* v *Sidal*, C-189/91, ECLI:EU:C:1993:907.

reference to the entire population if national legislation is in question,[208] reference to the workforce of an undertaking if an employer's policy is being challenged, or reference to those covered by the collective agreements, if such measures are at stake.[209] However, in many cases the selection of the correct group can be difficult. For example, it maybe unclear whether the entire workforce of the company or only a specific factory should be included or whether to include potential employees that had no access to the employment because of de facto discriminatory practices. At times, the CJEU has also recommended a rather narrow pool of comparators. For example, in *Bravo*, which concerned statutory employment benefits, it did not consider references to the entire population to be sufficient because only some part-time workers were negatively affected by the measure in question, namely those 'to whom, taking into account the salary that they received during the last 180 days of their employment, the maximum and minimum amounts of unemployment benefit are intended to apply.'[210]

Selecting the right group of comparator depends on a certain degree of comparability, at least regarding **equal value of work within equal pay cases**. In *Royal Copenhagen*, the CJEU held that the arbitrary formation of groups of men and women for the purpose of comparison must be avoided. Instead it required the national court to 'satisfy itself that the two groups each encompass all the workers who, taking account of a set of factors such as the nature of the work, the training requirements and the working conditions, can be considered to be in a comparable situation.'[211] It thus required the evaluation of every job and every criterion decisive for remuneration to establish the right pool of comparators. This can be a difficult or near impossible task, depending on the way the work is organised. A too strict adherence to the comparability element also invites a disproportionate amount of judicial discretion, ignoring the gendered structure that led to the inequality.[212]

In equal pay cases, the question of the equal value of work becomes specifically important, if we consider the hourly remuneration provided for the work.[213] However, other equal pay and treatment cases do not require comparability of this kind. Different work in the same undertaking may be of different value and might thus be remunerated differently. However, that does not mean that all working conditions should be different, too. For example, access to and calculation of pensions, rules on seniority and promotion, or entitlements to flexible work arrangements may nevertheless apply to all.

Unsurprisingly, national courts primarily focus on the comparability of situations within the context of direct sex discrimination and in relation to equal pay for equal work.[214] Some national courts then demonstrate a rather lenient approach within the context of indirect sex discrimination. There is only limited consideration of the correct pool of comparators. Consider, for example, a **Slovakian** case concerned with the increased minimum wage of midwives and birth assistants but not the wage of other non-doctor employees in healthcare facilities. The Supreme Court rejected the workers' comparability and thus direct sex discrimination.[215] Regarding the gender dimension, it held that the wage increases improved (pay) equality, as it increases midwives' pay in comparison to the wages of doctors, although their work was surely not of the same value. While it did not explicitly engage with the concept of indirect sex discrimination, it also did not find any difficulties in including doctors within the comparison. While other Member States very much focus on the comparability of the groups,[216] this broader pool of

208 Judgment of 13 July 1989, *Rinner-Kühn* v *FWW Spezial-Gebäudereinigung*, C-171/88, ECLI:EU:C:1989:328 para 11.
209 Judgment of 27 June 1990, *Kowalska*, C-33/89, ECLI:EU:C:1990:265; judgment of 27 October 1993, *Enderby* v *Frenchay Health Authority and Secretary of State for Health*, C-127/92, ECLI:EU:C:1993:859.
210 Judgment of 17 November 2015, *Plaza Bravo*, C-137/15, ECLI:EU:C:2015:771 para 24; judgment of 14 April 2015, *Cachaldora Fernández*, C-527/13, ECLI:EU:C:2015:215, para 30.
211 Judgment of 31 May 1995, *Specialarbejderforbundet i Danmark (Royal Copenhagen)* v *Dansk Industri,* C-400/93, ECLI:EU:C:1995:155, paras 36-38.
212 Ellis, E. and Watson, P. (2012) *EU Anti-Discrimination Law* (2nd edn, Oxford University Press) p. 152.
213 See detailed engagement in Burri, S.D. (2019) *National cases and good practices on equal pay* (European Commission, European network of legal experts in gender equality and non-discrimination) available at: https://ec.europa.eu/info/sites/info/files/equalpaygoodpractices.pdf.
214 Burri, S.D. (2019) *National cases and good practices on equal pay* (European Commission, European network of legal experts in gender equality and non-discrimination) available at: https://ec.europa.eu/info/sites/info/files/equalpaygoodpractices.pdf.
215 Case No. PLÚS 13/2012-90 of 19 June 2013.
216 E.g. **Belgian** and **Estonian** Questionnaires to this report.

comparators (beyond equal situation or equal value) allows a more detailed consideration of the systemic advantages and disadvantages of men and women within the labour market.

In a case that falls outside the scope of employment discrimination, the **Swedish** Ombudsman explained that the correct pool of comparators depends on the specific situation concerned. The case was concerned with the turnaround time of banks regarding persons who change their legal sex and hence also their social security number. While the Ombudsman did not find discrimination in the end, one of the questions was whether the claimant in that situation should be compared with people who had to change their security number for other reasons, or with all bank customers. The Ombudsman chose the latter, because all bank customers should be able to expect a reasonable level of service.[217] If we were to translate this argument to the employment environment outside equal pay, comparability should be held to include all employees.

It has been suggested that the relevant pool of comparators is different for equal pay claims on the one hand and equal treatment claims on the other. For example, in **Sweden**, measures that relate to pay or wage development (e.g. regarding long-term sick leave) are usually assessed with a focus on the workplace level, while rules on working requirements (e.g. height requirement) were assessed with reference to the average height within the population.[218] The difference may be explained by reference to the reach of the measure. While it is relatively simple to determine who is affected by a pay policy of an undertaking or a collective agreement, for example, broader employment practices including recruitment can potentially affect the whole population, as they impede access to employment. Regarding the former, the question of equal value of work then becomes key in deciding the pool of comparators.

In that context, the Commission considers transparency of pay systems to be paramount.[219] Several Member States have introduced measures to improve transparency and determine the meaning of 'equal value'. For example, the **German** Pay Transparency Act refers to the nature of the work, training requirements and working conditions.[220] The Federal Labour Court has referred to the necessity for previous knowledge, skills and abilities, professional duties and educational qualifications to establish the value of work.[221] In a **Czech** case, length of practice, expertise and reputation were considered relevant beyond the similarities within the employment contract.[222] One may wonder whether these criteria are indeed objective and gender neutral. In practice, it has been noted that within the evaluation process, female work is often devalued and the incomparability of typical female (e.g. secretarial services) and typical male (e.g. technical services) work is simply assumed.[223] These difficulties are of course not limited to equal pay or treatment claims that are concerned with indirect discrimination but address the questions of equal work and work of equal value in more general terms. However, they are potentially more pronounced within indirect sex discrimination claims, because the focus on apparently neutral criteria is likely to broaden the scope of comparison.

As the whole population could potentially access specific employment, it often makes sense to consider the effect of a certain criterion by reference to the whole population. However, it is then often assumed that other working conditions only affect the actual employees without recognising that disadvantageous

217 Equality Ombudsman GRA 2017-108, GRA 2017-109, GRA 2017-110 and GRA 2017-111.
218 Labour Court judgement AD 2001 No. 103 and judgement AD 2005 No. 87. See further discussion in Fransson, S. and Stüber, E. (2015) *Diskrimineringslagen. En kommentar*, (Commentary on the Discrimination Act (2008:567)), Norstedts, Stockholm; **Swedish** Questionnaire to this report.
219 Commission Recommendation 2014/124/EU of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency, OJ L 69, 8.3.2014, pp. 112-116; Veldman, A. (2017) *Pay transparency in the EU – A legal analysis of the situation in the EU Member States, Iceland, Liechtenstein and Norway* (European Commission, European network of legal experts in gender equality and non-discrimination).
220 Pay Transparency Act, Article 4(2). Similar to judgment of 31 May 1995, *Specialarbejderforbundet i Danmark (Royal Copenhagen)* v *Dansk Industri,* C-400/93, ECLI:EU:C:1995:155.
221 Federal Labour Court, judgment of 26 January 2005, 4 AZR 171/03; Federal Labour Court, judgment of 23 August 1995, 5 AZR 942/93; Federal Labour Court, judgment of 10 December 1997, 4 AZR 264/96.
222 District Court in Blansko, judgement No. 78 EC 1342/2011 of 30 June 2015.
223 See comments in the **German** Questionnaire to this report with reference to Federal Labour Court, judgment of 26 January 2005, 4 AZR 171/03 and Federal Labour Court, judgment of 19 April 2012, 6 AZR 578/10.

working conditions can impede access to employment, too. The strict distinction between discrimination within the recruitment process and discrimination while in employment should thus not be upheld.[224]

Beyond the scope of agency workers, the single source requirement to determine the correct pool of comparators reduces the potential effect of non-discrimination law. In particular, in highly segregated and gendered labour markets, indirect sex discrimination law can make little difference if no responsible entity can be identified. New types of employment and work within the gig economy further challenge the dichotomy of employer-employee and may require a much broader consideration of disadvantages and duty-holders.

4.3.3 What is the detrimental effect attributed to?

Once there is a disadvantage and the frame of reference has been established, the detrimental effect has to be attributed to a measure, criterion or practice. This is a wide definition that allows the scrutiny of a large number of actions and not just specific requirements, burdens or hurdles that disadvantage a disproportionate number of women or men.

It has been uncertain to what degree the CJEU requires the identification of a specific requirement that causes the disadvantage or alternatively embraces a more collective approach that focuses on unequal outcomes only. In many cases the criterion, practice or measure will be easily identifiable as an isolated measure. This has been recognised regarding the exclusion of part-time workers from occupational pension schemes, for example.[225] In other situations, structural disadvantages are only identifiable by reference to the result without the specific reason or cause being obvious. A collective approach will often more easily identify these structural disadvantages, as it would focus on general outcomes rather than specific criteria. The CJEU's approach is somewhat in between both extremes.

In *Enderby* the Court rejected the notion that a successful claim of indirect discrimination required the identification of a **'specific *de facto* discriminatory requirement'**. The case concerned the different pay of speech therapists and pharmacists performing work of equal value, which was not caused by a 'specific requirement' but rather was the result of different collective agreements applying to both professions which in themselves were not discriminatory. However, this did not prevent the CJEU from identifying a prima facie case of indirect discrimination, given that there was a significant gender imbalance between the occupations.[226] This line of reasoning has been confirmed in *Kenny*.[227] There is thus some scope to let the facts speak for themselves if the workers indeed perform the same work or work of equal value.[228]

This raises the question whether a wage system as a whole can be subject to scrutiny, if it de facto creates unequal results. Early **equal pay cases** indeed suggest that the Court takes such a **collective approach**. For example, in *Rummler* the CJEU considered the discriminatory effect of a wage system that rewarded requirements that could typically be fulfilled more easily by men (like strength) and ignored other criteria in relation to which women workers may have a particular aptitude.[229] However, this approach was given up in later cases, where the court rejected that it was sufficient to demonstrate average pay differences to

224 This however seems to be the approach of the German courts. The report notes: Federal Labour Court, judgment of 18 September 2014, 8 AZR 753/13. 'In 2014, the Federal Labour Court rejected the use of official statistics on significant differences in the employment of mothers (25 % full time) and fathers (95% full time) for proving sex discrimination against a female job applicant caring for a seven-year old child, with the argument that these statistics covered discrimination in existing employment but not the question of discrimination when applying for full-time employment.'

225 Judgment of 13 May 1986, *Bilka* v *Weber von Hartz,* C-170/84, ECLI:EU:C:1986:204; judgment of 28 September 1994, *Vroege* v *NCIV*, C-57/93, ECLI:EU:C:1994:352; judgment of 24 October 1996, *Dietz* v *Stichting Thuiszorg Rotterdam*, C-435/93, ECLI:EU:C:1996:395;.

226 Judgment of 27 October 1993, *Enderby* v *Frenchay Health Authority and Secretary of State for Health*, C-127/92, ECLI:EU:C:1993:859 para 16.

227 Judgment of 28 February 2013, *Kenny and Others*, C-427/11, ECLI:EU:C:2013:122.

228 For assessment of equal value see judgment of 30 March 2000, *JämO*, C-236/98, ECLI:EU:C:2000:173; judgment of 26 June 2001, *Brunnhofer*, C-381/99, ECLIEU:C:2001:358.

229 Judgment of 1 July 1986, *Rummler* v *Dato-Druck*, C-237/85, ECLI:EU:C:1986:277 paras 15, 17.

establish a presumption of indirect discrimination, unless the pay system totally lacked transparency.[230] If the latter is the case, the employer will still be able to explain the pay system and demonstrate that the comparison of overall outcomes paints a misleading picture. There is thus no obligation to achieve equal outcomes for men and women within the pay system.[231] Accordingly, a pay system is not simply suspect because there is a pay gap between men and women as this could be easily explained by the fact that women and men working for the company perform work of different value or because different jobs include different essential criteria that influence the broader working conditions. Although the way that equal value or essential work criteria are assessed and recognised can still be subject to evaluation, the CJEU in principle favours an **assessment of each criterion separately**, which requires the consideration of each individual criterion that influences the pay or treatment. This can be a monumental task, since there may be a number of criteria that determine specific treatment and pay. Moreover, these criteria may not necessarily seem problematic if considered separately but together can create greater burdens on some groups than others. If that is the case, the transparency requirement may be the most successful avenue to challenge the pay differences. Specifically, if the pay system is not transparent and a consideration of each criterion thus impractical, a collective approach, comparing the criteria applying to two different groups, can still be conducted.[232] Moreover, the collective outcomes are also still relevant if we consider the effect of a specific criterion, measure or practice. After all, indirect sex discrimination law is demonstrated by reference to effects on groups of workers. The separate consideration of each individual criterion thus gains importance if the comparability of groups is questioned, specifically if it is not clear if we are considering work of equal value within a pay dispute.

There is also the risk of a **lack of transparency** within a system, making it impossible to identify the measure, criterion or practice that creates the particular disadvantage. For example, in *Commission v France*, the CJEU considered that a quota system to access various ranks of the police force was not transparent and could not be properly supervised. Specifically, the Court highlighted that the percentage of women and men allotted to the various positions was fixed without the use of any objective criteria. Accordingly, it was impossible to verify whether the percentages 'correspond to specific activities for which the sex of the persons to be employed constitutes a determining factor.'[233] Similar considerations were relevant within the equal pay claim in *Danfoss*.[234] This recognises a fundamental principle, that 'individuals involved are entitled to know the basis upon which employment decisions affecting them are reached,'[235] at least where the facts suggest a prima facie case of indirect sex discrimination. Specifically, it recognised that if this were not the case, women would be deprived of any effective means of enforcing the principle of equal pay. If the system lacks transparency, it may thus be sufficient to demonstrate that the whole system systematically disadvantages women.[236]

In practice, this has significant relevance for the **shift of the burden of proof**. While the claimant usually needs to establish a prima facie case of discrimination by reference to measures, criteria or practices that produce the 'particular disadvantage', if the system lacks transparency, it may be sufficient to refer to significant differences in collective outcomes. It is then up to the employer to demonstrate that the system is not discriminatory.[237] For example, in *Royal Copenhagen* the employer was given the opportunity to

230 Judgment of 17 October 1989, *Handels- og Kontorfunktionærernes Forbund i Danmark* v *Dansk Arbejdsgiverforening* for *Danfoss*, C-109/88, ECLI:EU:C:1989:383.

231 Schiek, D. (2007) 'Indirect Discrimination' in Schiek, D., Waddington, L. and Bell, M. (eds) *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Ius Commune Casebooks for the Common Law of Europe (Hart Publishing) pp. 323, 390.

232 Judgment of 31 May 1995, *Specialarbejderforbundet i Danmark (Royal Copenhagen)* v *Dansk Industri,* C-400/93, ECLI:EU:C:1995:155.

233 Judgment of 30 June 1988, *Commission* v *France*, C-318/86, ECLI:EU:C:1988:352 paras 26-27.

234 Judgment of 17 October 1989, *Handels- og Kontorfunktionærernes Forbund i Danmark* v *Dansk Arbejdsgiverforening* for *Danfoss*, C-109/88, ECLI:EU:C:1989:383; judgment of 31 May 1995, *Specialarbejderforbundet i Danmark (Royal Copenhagen)* v *Dansk Industri,* C-400/93, ECLI:EU:C:1995:155.

235 Ellis, E. and Watson, P. (2012) *EU Anti-Discrimination Law* (2nd edn, Oxford University Press) p. 389.

236 Judgment of 17 October 1989, *Handels- og Kontorfunktionærernes Forbund i Danmark* v *Dansk Arbejdsgiverforening* for *Danfoss*, C-109/88, ECLI:EU:C:1989:383.

237 Judgment of 17 October 1989, *Handels- og Kontorfunktionærernes Forbund i Danmark* v *Dansk Arbejdsgiverforening* for *Danfoss*, C-109/88, ECLI:EU:C:1989:383; judgment of 30 March 2000, *JämO*, C-236/98, ECLI:EU:C:2000:173.

demonstrate that the differences in a piece-work pay scheme were due to different individual outputs and therefore indeed calculated on the same unit of measurement. The units of measurements themselves were not questioned as long as they are 'objectively capable of ensuring that the total individual pay of workers in the two groups is the same for work which, although different, is considered to be of equal value.'[238]

Focusing on individual assessments rather than collective outcomes seems particularly problematic within the context of recruitment and promotion procedures, especially if these procedures are not based on specific criteria or other clearly identifiable reasons for decisions, as it rejects the idea that the gender imbalance within an undertaking says anything about the recruitment and promotion procedures themselves. Thus, while statistics are helpful in identifying the disproportional burden that a measure creates, they often cannot be used as evidence of the different treatment per se. Accordingly, the **German** Federal Labour Court did not consider it relevant that an undertaking with a primarily female workforce (69 %) did not have any female higher-level managers. Instead, it required proof of female employees who were eligible for promotion and that the exclusion of women was not the result of structural gender inequality beyond the control of the employer.[239] Both of these issues would have been better placed within the scope of the objective justification. To counterbalance this difficulty, the **Spanish** Supreme Court drew on the logic of transparency, and held that lack of transparency in promotion processes and career progression can constitute indirect sex discrimination as it leads to women stagnating in lower ranking positions, according to statistical analysis, e.g. when positions for promotion are not publicly announced to the staff or the decision is left to the arbitrary choice of the immediate superiors.[240] A similar logic should apply to recruitment procedures, but many courts have predominantly focused on recruitment requirements that are apparently neutral, such as previous experience and specific qualifications.[241] Overall, these challenges highlight the need for a somewhat more robust framework to ensure equal access and equal representation. After all, it is often difficult to identify a specific discriminatory measure, but the outcomes nevertheless suggest some sort of structural inequality or bias.[242] The **French** expert refers in that regard to a 2019 case where the court indeed recognised systemic discrimination.[243] The case concerned the creation of a system of oppression that foreign undocumented workers were subjected to in their working environment. In the hearing, sociologists provided evidence that such practices were common within the industry as a whole. Such an approach would enable claimants to prove

> 'a combination of sources of structural inequality showing that indirect and direct sex discrimination can be linked to a specific sector of activity and go beyond the single source, such as the enterprise.

238 Judgment of 31 May 1995, *Specialarbejderforbundet i Danmark (Royal Copenhagen)* v *Dansk Industri,* C-400/93, ECLI:EU:C:1995:155, para 20.

239 Federal Labour Court, judgment of 22 July 2010, 8 AZR 1012/08, overruling the State Labour Court of Berlin and Brandenburg, judgment of 26 November 2008, 15 Sa 517/08. The **Romanian** approach seems similar in that respect.

240 Judgment of the Supreme Court 5798/2011, of 18 July 2011 (Rec. 133/2010), ECLI:ES:TS:2011:5898; Judgment of Labour Court No. 1 of Palma de Mallorca 4848/2018, of 11 June 2018 (Rec. 623/2017), ECLI:ES:JSO:2018:4848.

241 **Spanish** Supreme Court 8771/2001, of 12 November 2011, (Rec. 3708/1999), ECLI:ES:TS:2001:8771; Judgment of the High Court of Justice of the Basque Country 472/2001, of 30 January 2001 (Rec. 3009/2000), ECLI:ES:TSJPV:2001:472; Judgments of the High Court of Cantabria 1593/2005, of 14 November 2005, (Rec. 905/2005) ECLI:ES:TSJCANT:2005:1593 and 887/2007, of 23 May 2007 (Rec. 417/2007) ECLI:ES:TSJCANT:2007:887; **Italian** Tribunal of Catania 22/11/2000; **Finnish** Ombudsman TAS 325/2012, 05.11.2012 (see discussion above).

242 Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures COM/2012/0614 final – 2012/0299.

243 Labour Court, Paris no 17/10051, 17 December 2019; for a commentary, see Peyronnet, M. (2020) 'Discrimination systémique dans le BTP: une notion nouvelle aux effets limités', *Dalloz actualité*, 8 January 2020, available at: https://www.dalloz-actualite.fr/flash/discrimination-systemique-dans-btp-une-notion-nouvelle-aux-effets-limites#.X65p_2hKiUk. This is the first case which is not a sex case where direct and indirect discrimination was observed in the construction industry and where a subcontractor had voluntarily and involuntarily created a system of oppression using undocumented Malian workers. A sociologist used as a witness certified these practices located in the whole industry and this was attested by the Defender of Rights Decision No. 2019-108 (Décis. du Défenseur des droits No. 2019-108, 19 April 2019, p. 18), available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=29007; see also Mercat-Bruns, M. (2020) 'Les différentes figures de la discrimination au travail: quelle cohérence?' (The different forms of discrimination at work: what coherence?) *Revue de Droit du Travail*, No. 8, pp. 25-26.

> The indirect and direct discrimination can be located through social framework evidence[244] brought about through sociological studies.[245]

4.3.4 How is the detrimental effect established?

To establish a detrimental effect, one needs to compare those who benefit from the provision, criterion or practice with those who do not benefit. If there is disparity between the number of men and women who benefit and who do not, a detrimental effect can be established. Most commonly, the detrimental effect or disproportionate burden within indirect discrimination law has been established by statistics.[246] The relative burden of the measure can then also be relevant for the proportionality analysis discussed below. The choice of statistical data depends on the frame of reference. As discussed above, that is not always easy to determine. The necessary data may also not always be available. For example, in *Bravo*, only some part-time workers were negatively affected by the measure in question, namely those 'to whom, taking into account the salary that they received during the last 180 days of their employment, the maximum and minimum amounts of unemployment benefit are intended to apply.'[247] Accordingly, general statistical data concerning part-time workers did not establish that a much higher number of women than men are affected by that provision. However, the CJEU has recognised that claimants may be deprived of their rights if the requirement to refer to relevant statistics is applied too strictly.[248] It may thus be sufficient to refer to general statistical data, if data on the specific sector or undertaking is not available.

The proper identification of the pool of comparators remains important if the **disparate impact is demonstrated by statistical means**, as it requires a statistical disadvantage that can be demonstrated by reference to the measure's disproportionate burden on men or women within this pool.[249] For example, with respect to social security legislation, the Court has repeatedly held that 'indirect discrimination on grounds of sex arises where a national measure, albeit formulated in neutral terms, puts considerably more workers of one sex at a disadvantage than the other.'[250] While most cases have focused on the proportional disparities within the disadvantaged group, the CJEU has also accepted a focus on the advantaged group.[251] Whether the focus should be on the disadvantaged or advantaged group also causes some confusion within the Member States.[252] It has been argued that a focus on the disadvantaged group is more in line with the *effet utile* of EU law.[253]

In *Seymour-Smith*, the CJEU required that national courts

> 'consider the respective proportions of workers who are and who are not affected by the rule at issue within the male workforce and, on the other, the same proportions within the female

244 This has already been used in the United States: Hart M., Secunda P. (2009) 'A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions', 78 *Fordham Law Review* 37, available at: https://ir.lawnet.fordham.edu/flr/vol78/iss1/12.

245 See also Mercat-Bruns, M. (2018) 'Systemic discrimination: rethinking the tools of gender equality' 2 *European Equality Law Review* 1.

246 Judgment of 30 November 1993, *Kirsammer-Hack* v *Sidal*, C-189/91, ECLI:EU:C:1993:907; judgment of 9 February 1999, *Seymour-Smith and Perez*, C-167/97, ECLI:EU:C:1999:60.

247 Judgment of 17 November 2015, *Plaza Bravo*, C-137/15, ECLI:EU:C:2015:771 para 24; judgment of 14 April 2015, *Cachaldora Fernández*, C-527/13, ECLI:EU:C:2015:215 para 30.

248 Judgment of 3 October 2019, *Schuch-Ghannadan*, C-274/18, ECLI:EU:C:2019:828.

249 See above, sections 4.2 and 4.3.2.

250 Judgment of 17 July 2014, *Leone*, C-173/13, ECLI:EU:C:2014:2090 para 41; judgment of 18 March 2014, *Z.* v *A Government department* C-363/12, ECLI: EU:C:2014:159, para 53; judgment of 20 June 2013, *Riežniece*, C-7/12, ECLI:EU:C:2013:410 para 39; judgment of 20 October 2011, *Brachner*, C-123/10, ECLI:EU:C:2011:675, para 56.

251 Judgment of 20 October 2011, *Brachner*, C-123/10, ECLI:EU:C:2011:675, paras 60-62.

252 Belgium Labour Court of Ghent 14 January 2014, Chroniques de droit social/Sociaalrechtelijke Kronieken, 2014, page 292; Labour Court of Appeal Mons, 23.12.2018, Journal des tribunaux du travail, 2019, p. 23.

253 Schiek, D. (2007) 'Indirect Discrimination' in Schiek, D., Waddington, L. and Bell, M. (eds) *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Ius Commune Casebooks for the Common Law of Europe (Hart Publishing) pp. 323, 409. See in relation to the distinction of direct and indirect discrimination: Mulder, J., 'Vulnerability and indirect discrimination. Terminological bingo or rigorous conceptual separation within EU consumer law?' (forthcoming).

> workforce. It is not sufficient to consider the number of persons affected, since that depends on the number of working people active in the Member State as a whole as well as the percentages of men and women employed in that Member State.'[254]

Moreover, a number of additional factors need to be taken into account, such as evidence of a small 'but persistent and relatively constant disparity over a long period between men and women',[255] whether the statistics 'cover enough individuals, whether they illustrate purely fortuitous or short-term phenomena, and whether in general they appear to be significant.'[256] In conclusion, the CJEU asked national courts to verify whether statistics indicate that a 'considerably smaller percentage of women than men is able to fulfil the requirement imposed by that measure.'[257] Taken together, this leaves some flexibility to the national courts to assess the statistical evidence as they deem fit. However, the CJEU has continuously emphasised the need for some statistical significance as long as the statistics are indeed available.[258] For example, in *Jørgensen*, the Court rejected the representative nature of the statistical evidence as the measure was detrimental to only 22 medical practitioners (64 % of whom were women) out of 1 680 medical practitioners (18 % of whom were women).[259]

National approaches differ widely in their approach towards statistical evidence, with few considering the statistical evidence in detail. A notable exception is the **Netherlands**, where a correlation test was introduced to determine the statistical significance of the different burdens:[260]

$$\varphi = (a*d - b*c)/\sqrt{(a+c)(b+d)(a+b)(c+d)}$$

The correlation, φ is calculated according to the formula above, where a = the number persons from the allegedly disadvantaged group; b = the number persons in the group they are compared with that are disadvantaged by the measure; c = the number of not-disadvantaged persons in the allegedly disadvantaged group; d = the number of not-disadvantaged persons in the group they are compared with. Any correlation of 1.5 or above is deemed significant. More flexible approaches that consider additional data if the results do not demonstrate a significant imbalance, such as long-term trends in the undertaking and the wider population, have been dismissed by the Dutch courts.[261] Whether the CJEU requires such a rigid approach remains questionable.

The **Swedish** Labour Court has outlined its approach towards statistical comparison regarding a case that concerned a requirement to be at least 1.63m to work on the assembly line. Accordingly, one first needs to compare the share of women and the share of men who could and could not meet this requirement. Secondly, the court compared the share of women and share of men who could not meet the requirement.[262]

While generally following *Seymour Smith* by verifying within each pool of men and women their situation with regard to the particular advantage or disadvantage,[263] the **French** Court of Cassation has emphasised the importance of statistics in determining whether the refusal to reassign a woman to her own job as the (only) accountant or an equivalent role following her return from parental leave constituted indirect

254 Judgment of 9 February 1999, *Seymour-Smith and Perez*, C-167/97, ECLI:EU:C:1999:60 para 59; judgment of 8 May 2019, *Villar Láiz,* C-161/18, ECLI:EU:C:2019:382 para 39.
255 Judgment of 9 February 1999, *Seymour-Smith and Perez*, C-167/97, ECLI:EU:C:1999:60 para 61.
256 Judgment of 9 February 1999, *Seymour-Smith and Perez*, C-167/97, ECLI:EU:C:1999:60 para 62; judgment of 27 October 1993, *Enderby* v *Frenchay Health Authority and Secretary of State for Health*, C-127/92, ECLI:EU:C:1993:859 para 17; judgment of 8 May 2019, *Villar Láiz,* C-161/18, ECLI:EU:C:2019:382 para 40.
257 Judgment of 9 February 1999, *Seymour-Smith and Perez*, C-167/97, ECLI:EU:C:1999:60 para 65.
258 Judgment of 3 October 2019, *Schuch-Ghannadan*, C-274/18, ECLI:EU:C:2019:828.
259 Judgment of 6 April 2000, *Jørgensen*, C-226/98, ECLI:EU:C:2000:191.
260 CGB 2004-27 and 2009-78; Vas Nunes, P.C. (2018) *Gelijke behandeling in arbeid* (Boom Juridische uitgevers, Bakelsinstituut) p. 102.
261 Prof Dr Elffers, H., in Hof the Hague NL:GHDHA:2015:1284 (09.06.2015) PJ 2015, 143, para 4.5. and NL:GHDHA:2015:1285 (09.06.2015) PJ 2015, 113, para 4.5.
262 Swedish Labour Court, judgement AD 2005 No. 87.
263 Court of Cassation, 19 December 2000, Bull. No. 436.

sex discrimination because more than 96 % of workers taking parental leave are women.[264] The **French** Questionnaire to this report suggests that this constitutes a new way statistical evidence is utilised, as it not only demonstrates the proportion, degree or particularity of the disadvantage but also the nature of the structural gender inequality that persists within society. For example, in the 2019 case, national statistics were used to consider the negative career developments women often experience because of parental leave, which subsumed the case under the scope of indirect sex discrimination.[265] Such an argumentation seems to combine statistical as well as qualitative arguments and can potentially broaden the scope, as it would allow the recognition of gendered criteria (such as parental leave) with reference to statistical evidence without the need to consider specific statistics concerned with the precise frame of reference.

Once the correct frame of reference is established, the question remains whether the lack or presence of a statistical disadvantage is accidental and whether the data is meaningful. For example, a **Polish** case was concerned with a relatively small group of employees (three women and two men) with relatively similar overall working conditions. The claimant challenged the employer's offer to the male employees to do additional work for additional income and alleged that the work responsibilities and basic salary for all employees should have been increased instead. The Supreme Court rejected a possible case of indirect pay discrimination because it was unable to separate a (female) group of victims from another group.[266] This was due to the small group of employees and the fact that not all women suffered the same detriment. The Polish courts also required the data to refer to a similar timeline. In such circumstances, qualitative reasoning may be paramount for the identification of a potential disadvantage.

The **Irish** courts have held that statistics are not decisive in themselves and they are only one aspect to be taken into account when considering whether a putative neutral requirement is in fact indirectly discriminatory.[267] The court stated: 'What must be demonstrated is that the cause of the difference has such a disparate impact as between men and women as to infer that an ostensibly gender neutral determinative of pay is, in reality, discriminatory because it leads inexorably to unequal pay for equal work.'[268] In *Nationalist & Leinster Times Limited* v *Ashmore*, this was even questioned in a situation where a part-time and a full-time worker were paid a different hourly rate for 'like work'.[269] Specifically, the court only considered statistics to constitute an evidential tool to look beyond formal equality. The court stated that

> 'The essential component inherent in this test is that the advantaged group be made up predominantly of one gender and the disadvantaged group be made up substantially of the other gender. It is also essential that the statistics relied upon are significant and this normally requires that they cover a significantly large sample and that the results are not distorted by fortuitous or short term phenomena.... It is thus clear that the authorities that a PCP [provision, criterion or practice] can be held to be indirectly discriminatory where it bears significantly more heavily on workers of one gender relative to those of the other. Where statistics are used as evidence of this state of affairs they must suggest something that is systemic or indicative of a pay structure that is intrinsically discriminatory, rather than a "fortuitous" or "short-term" phenomenon.'

264 Court of Cassation, 14 November 2019, No. 18-15682. See **French** flash report: https://www.equalitylaw.eu/downloads/5108-france-court-of-cassation-social-chamber-14-november-2019-n-18-15682-79-kb with reference to CJEU, judgment of 8 May 2019, *RE* v *Praxair MRC*, C-486/18.

265 Court of Cassation, 14 November 2019, No.18-15682; see **French** flash report: https://www.equalitylaw.eu/downloads/5108-france-court-of-cassation-social-chamber-14-november-2019-n-18-15682-79-kb.

266 Supreme Court of 22 February 2007, I PK 242/06.

267 Irish High Court, *King* v *Minister for Finance* [2010] IEHC 307, unreported O'Keeffe J., 5 December 2010.

268 Irish Labour Court, *Nationalist & Leinster Times Limited* v *Ashmore* [2013] 24 ELR 216, EDA 133.

269 The complainant was paid less per hour as her male comparator received an additional element of pay known as the 'in house rate' in addition to the basic industry rate for the printing sector which the complainant did not receive. Further the complainant alleged that her male comparator receives a higher employer pension contribution rate relative to her.

As an evidential tool, statistics thus only weigh heavily if they are significant. As the statistics in the case above involved only very few workers, they were considered meaningless.[270] Accordingly, the different hourly pay between part-time and full-time workers was not addressed under the scope of indirect sex discrimination although it appeared to be a classic case. Certainly, a qualitative reasoning with reference to wider national statistics could have potentially revealed that part-time working is only an apparently neutral criterion, but is not gender neutral. However, it should be noted that Ireland's part-time employment rates are relatively low.

Beyond statistical evidence, the current legislation focusing on discrimination based on grounds other than sex makes it clear that indirect discrimination can be established by any means[271] and the CJEU has indicated some flexibility regarding the need to establish a link between part-time status and the female sex.[272] There can thus be a **qualitative assessment** as well as statistical assessment of the effects of the measure, criterion or practice. In line with that, the common definition of indirect discrimination across all equality directives now only requires a 'particular disadvantage' not a 'substantially higher proportion' of men or women being disadvantaged.[273] The redrafting recognises that statistical evidence may not be easily available (e.g. within the context of discrimination based on sexual orientation) or may be illegal to compile in some Member States (e.g. within the context of race discrimination). The relaxation is also in line with the CJEU's approach towards indirect nationality discrimination, where the Court has never required similar statistical proof.[274] This development should generally be welcomed, as it is not always easy to produce the right evidence to establish a case of direct or indirect sex discrimination, given the limited access claimants have to this kind of information.[275]

However, the exact scope of the quantitative assessment within indirect sex discrimination remains unclear, as we have only limited experience with it in practice. Only a few CJEU cases explore qualitative assessment in detail. For example, in *Danfoss*, the CJEU seemed to accept that certain criteria for the allocation of bonuses – such as mobility, training and seniority – are known to disadvantage women. Within that context, it employed a substantive assessment, explaining why women are disadvantaged by these criteria with reference to typical female burdens and career paths, including childcare and household duties that affect mobility, lack of training opportunities and career breaks.[276] In *Leone*,[277] the Court simply found that the measure created an imbalance; an approach that is also often adopted within the French jurisdiction,[278] where the case originated. Specifically, it held the inclusion of extra service credits for childcare-related leave was 'in reality, liable to be met by a much lower proportion of male civil servants than female civil servants'[279] because it included compulsory maternity leave while all other forms of leave were voluntary. Recent decisions on part-time workers do not necessarily refer to specific statistical data either. Specifically, the court has rejected the argument that the claimant needs to

270 I.e. the pre-1998 employees – the total men (full time and part time went from 7 full time in 1998 to 2 full-time in 2012 and the total women went from 1 part time in 1998 to 0 women in 2012; then post-1998 employees were 0 men full-time or part-time in 1998 and in 2012 and the total women went from 0 to 4 part time in 2012).

271 Recital 15 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, 19.7.2000, pp. 22–26 and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, pp. 16-22; Recital 30 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, pp. 23-36; judgment of 19 April 2012, *Meister*, C-415/10, ECLI:EU:C:2012:217 para 43; judgment of 8 May 2019, *Villar Láiz,* C-161/18, ECLI:EU:C:2019:382 para 46.

272 Judgment of 3 October 2019, *Schuch-Ghannadan*, C-274/18, ECLI:EU:C:2019:828.

273 For the former definition see for example Article 2(2) Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex OJ L 14, 20.1.1998, pp. 6-8.

274 Judgment of 23 May 1996, *O'Flynn* v *Adjudication Officer*, C-237/94, ECLI:EU:C:1996:206.

275 Judgment of 19 April 2012, *Meister*, C-415/10, ECLI:EU:C:2012:217; judgment of 21 July 2011, *Patrick Kelly*, C-104/10, ECLI:EU:C:2011:506.

276 Judgment of 17 October 1989, *Handels- og Kontorfunktionærernes Forbund i Danmark* v *Dansk Arbejdsgiverforening* for *Danfoss*, C-109/88, ECLI:EU:C:1989:383.

277 For details on the case see section 4.1 above.

278 **French** Questionnaire to this report.

279 Judgment of 17 July 2014, *Leone*, C-173/13, ECLI:EU:C:2014:2090, para 51.

provide robust statistical data, if the claimant has limited or no access to the data and statistical facts.[280] This may suggest a general relaxation, although statistical evidence continues to be a key aspect in the context indirect sex discrimination.

Practice within the Member States confirms the relevance of statistical data. Qualitative reasonings are possible but rarely used and statistical evidence is often seen as a practical necessity. Legal definitions vary and may also imply the need for statistical evidence[281] or take a more flexible approach.[282] Countries such as **Belgium**, where statistical evidence can be used, although is not used regularly, have only very few cases on indirect sex discrimination and only address the most obvious forms, such as part-time discrimination. Courts sometimes also require additional indicators that there is indeed causality between the disadvantage and the sex in the context of statistical evidence. For example, **German** case law has rejected indirect sex discrimination in cases were a number of other explanations for the statistical pay difference were available. This specifically included different negotiating skills, contractual freedom, and women's absence from work due to maternity and childcare periods, as well as less seniority.[283] The second instance confirmed that the claimant was not able to demonstrate causality between the lower remuneration and her sex.[284] This however confuses the issue. Specifically, statistical evidence alone can establish a prima facie case of indirect sex discrimination that presumes causation that can only, if at all, be disproven within the scope of the objective justification. The reasons for statistical differences unrelated to sex may then be considered under said justification.[285] Additionally, a qualitative assessment of these 'other reasons' identified by the German court could have led to the same conclusion. Specifically, it could have been demonstrated how criteria such as negotiating skills, contractual freedom, absences due to maternity and parental leave or seniority are indeed gendered, as they do not take into account women's abilities and experience in equal measure.

The sole focus on statistical evidence to establish a prima facie case of indirect discrimination is thus ambivalent. When used, it rarely causes problems. As court cases on indirect discrimination are rare, it is unsurprising that those that finally reach the courts deal with relatively obvious disadvantages, which can be demonstrated through the use of an uncontroversial frame of reference and corresponding statistical data. In these instances, statistics can serve as a convincing evidential tool. However, an exclusive focus on statistics limits the number of cases that are considered within the scope of indirect sex discrimination to cases of relatively overt indirect sex discrimination and leads to cases where meaningful statistical evidence does not exist or is difficult to come by being ignored. Futhermore, it prevents a more qualitative assessment of the apparently neutral criteria and the way it is applied in practice, and potentially retains systemic inequality within the workplace.

4.4 Objective justification

Once the 'particular disadvantage' is established, the measure can still be justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary.[286] Within the EU context, objective justification is very much part of the definition of the concept of indirect discrimination. It is thus a negative condition. The measure creating a 'particular disadvantage' can be discriminatory unless it is justified. However, that should not distract from the fact that it is the role of the defendant (e.g. employer)

280 Judgment of 3 October 2019, *Schuch-Ghannadan*, C-274/18, ECLI:EU:C:2019:828; as well as previous judgment of 26 September 2000, *Kachelmann*, C-322/98, ECLI:EU:C:2000:495, para 24, where the Court held that it was 'common ground that in Germany part-time works are far more likely to be women than men.'

281 See for example, the need under **Polish** law to demonstrate the existence of two opposing groups and the neglect of hypothetical situations.

282 See for example **Slovakia's** and **Slovenia's** definitions, which both use the singular rather than the plural.

283 Labour Court of Berlin, judgment of 1 February 2017, 56 Ca 5356/15.

284 State Labour Court of Berlin and Brandenburg, judgment of 5 February 2019, 16 Sa 983/18. See also Federal Labour Court, judgment of 23 November 2017, 8 AZR 604/16 that implies a causality requirement.

285 See section 4.4.4 below.

286 Article 2(1)(b) Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, pp. 23-36.

to justify the measure. The burden of proof thus shifts to the duty bearer. Regarding the assessment of the objective justification, the CJEU has left great discretion to the national courts to assess this. Thus, the Court's case law mainly functions as a guide.

4.4.1 Shift of burden of proof

Article 19(1) Recast Directive 2006/54/EC states:

> 'Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.'

Although this provision is not limited to cases of indirect sex discrimination, the shift of burden of proof is essential to the concept. Given the difficulties of proving a negative, it would make claims of indirect sex discrimination almost impossible if this were left to the claimant. The claimant is only required to establish a prima facie case of indirect sex discrimination, and the defendant has to provide the objective justification – if there is one.

However, the burden of proof is not limited to that. After all, the defendant can also disprove the prima facie case of indirect discrimination itself. Thus, in *Danfoss*[287] and *Royal Copenhagen*,[288] the CJEU suggested that if the pay system lacks transparency and

> 'it is impossible to identify the factors which determine the rates or units of measurement used to calculate the variable element in the pay [...], the objective of not depriving workers of any effective means of enforcing the principle of equal pay may require the employer to bear the burden of proving the differences found are not due to sex discrimination.'[289]

It is then open to the defendant to provide more details and demonstrate that the pay system in fact does not create a 'particular burden'. As we have seen, demonstrating a prima facie case of indirect sex discrimination does not always require reference to specific statistical evidence within the specific frame of reference if that evidence is not available to the claimant.[290] Whether the defendant benefits from a similar degree of leniency seems however questionable as it primarily related to the establishment of a prima facie case of indirect sex discrimination that can be rebutted. Not only will employers or other duty bearers often have access to the relevant data to do so, it is also clear that lack of transparency within the system falls within their responsibility.

Beyond that, the CJEU has rejected that the rules on burden of proof entitle the claimant to see the qualifications of the other successful applicants to produce 'facts from which it may be presumed that there has been discrimination'. The employer has no obligation to disclose information about the internal recruitment process or the successful applicants. This may often make it difficult to prove discriminatory recruitment practices.[291] Accordingly, in *Kelly*, the court held that it

287 Judgment of 17 October 1989, *Handels- og Kontorfunktionærernes Forbund i Danmark* v *Dansk Arbejdsgiverforening* for *Danfoss*, C-109/88, ECLI:EU:C:1989:383.
288 Judgment of 31 May 1995, *Specialarbejderforbundet i Danmark (Royal Copenhagen)* v *Dansk Industri,* C-400/93, ECLI:EU:C:1995:155.
289 Judgment of 31 May 1995, *Specialarbejderforbundet i Danmark (Royal Copenhagen)* v *Dansk Industri,* C-400/93, ECLI:EU:C:1995:155 para 26.
290 Judgment of 3 October 2019, *Schuch-Ghannadan*, C-274/18, ECLI:EU:C:2019:828.
291 Judgment of 19 April 2012, *Meister*, C-415/10, ECLI:EU:C:2012:217.

> 'cannot be excluded that a refusal of disclosure by the defendant, in the context of establishing such facts, could risk compromising the achievement of the objective pursued by that directive and thus depriving that provision in particular of its effectiveness.'[292]

Accordingly, the requirements for demonstrating a prima facie case of indirect sex discrimination depend on the circumstances of the case, keeping in mind that the rules cannot be so strict as to deprive the provision of its effectiveness. Once it is established, it is up to the defendant to either disprove the prime facie case directly or to objectively justify the 'particular disadvantage.'

4.4.2 Aims of objective justification

There is some disagreement on whether objective justifications are meant to justify discriminatory treatment itself or should demonstrate that there is no causal link between the person's sex and the disadvantage but that the disadvantage can be attributed to some other cause. While the practical implications of this may not be too significant, the following will briefly summarise the two doctrinal perspectives.

In early CJEU case law, the former viewpoint was more prominent. It is what Tobler has termed a '**justification proper**'.[293] Its primary aim is not to rebut the discriminatory nature of the measure, but to justify it by reference to different interests and goals. Accordingly, the differential treatment may not only be justified because of objective differences between the benefiting and disadvantaged groups, but also because of 'real needs of the undertaking.'[294] For example, if a pay system rewards the outputs of the individual employee, it is wholly neutral from the point of view of sex. If the criterion in question systematically works to the detriment of women, for example because it uses a gendered notion of a productive employee, the measure disadvantages women and thus requires justification, for example by reference to overriding business interests.[295] A justification proper does not reject the discriminatory nature of the measure itself but implies that it has to be tolerated at times because of other overriding interests. This could potentially allow for a broad notion of possible objective justifications. In particular, economic entities and Member States' finances will always be concerned with cost and budgetary concerns and the issue has been raised in several cases. However, the CJEU has rejected purely financial aims within the context of the objective justification and separates them from broader issues of financial reorganisation.[296]

However, the CJEU insisting that the justification should be unrelated to the person's sex may also be recognised as a **causation approach**. There is a need to demonstrate that the disadvantage is attributed to some other business interest or legitimate aim and not to sex. If there is no other justification, the 'particular disadvantage' falls within the responsibility of the person who uses the apparently neutral measure, criterion, or practice and is thus discriminatory. Ellis views the objective justification test within indirect discrimination to be closely related to the question of causation that is also relevant within the context of direct discrimination. After all, unequal treatment based on criteria other than the protected sex is in principle lawful under EU non-discrimination law as long as there is no (indirect) link to sex or another protected ground. Since prima facie cases of indirect discrimination are demonstrated by an objective assessment of the effects of the measure only, it allows room to demonstrate that the differential treatment had nothing to do with the protected characteristic. Accordingly, if there is an objective justification for the 'particular disadvantage', it does not justify the discriminatory treatment

292 Judgment of 21 July 2011, *Patrick Kelly*, C-104/10, ECLI:EU:C:2011:506, para 34.
293 Tobler, C. (2005) *Indirect Discrimination* (Intersentia) pp. 183, 190-196.
294 Judgment of 31 March 1981, *Jenkins,* C-96/80, ECLI:EU:C:1981:80; judgment of 13 May 1986, *Bilka* v *Weber von Hartz,* C-170/84, ECLI:EU:C:1986:204.
295 Judgment of 17 October 1989, *Handels- og Kontorfunktionærernes Forbund i Danmark* v *Dansk Arbejdsgiverforening* for *Danfoss*, C-109/88, ECLI:EU:C:1989:383 paras 18-22.
296 See section 4.4.4 below.

but disproves the assumed discrimination itself.[297] This is not to deny the disadvantage connected to the difference but indicates that it falls outside the scope of indirect sex discrimination as the duty bearer is not responsible for this disadvantage. In such cases, the duty of structural change or reasonable accommodation can thus not be imposed under the symmetric concept of indirect sex discrimination. A substantive understanding of equality may nevertheless require structural change or reasonable accommodation to cut the link between the difference and the disadvantage.[298]

The causation approach seems to be more in line with the EU legal definition of indirect discrimination that approaches the absence of any objective justification as a negative constituting element for the existence of indirect discrimination. It also puts indirect discrimination in line with direct discrimination. Specifically, if objective justification is a precondition for any indirect sex discrimination to demonstrate causation, the idea that there is any scope for a general justification of discriminatory treatment (whether direct or indirect) outside the scope of specific exceptions can be rejected. According to that view, direct and indirect discrimination have the same two elements: (1) a disadvantageous or adverse treatment, which is (2) based on a protected characteristic or prohibited classification.[299] The concepts then only differ in the way they detect both elements, not the kind of treatment that they seek to ban. This has the added benefit of addressing the concern that private employers or companies are required to ensure equality contrary to their financial interest. If objective justification does not engage with the question of the proportional burden required to achieve equality but instead focuses on causation, it does not raise the same concerns of distributive justice and lessens the distinction between direct and indirect discrimination.[300] After all, it does not impose a duty on duty bearers, such as employers, to ensure substantive equality but only holds them accountable to the degree they exploit the structural inequalities, while also exposing structural disadvantage more generally.[301] On the other hand, it somewhat dismisses the detrimental effect that these measures have on specific groups even if they are deemed to be unrelated to sex. The causation approach thus should not reduce the strictness of the test.

It has been argued that indirect sex discrimination law is broader than simply banning causational disadvantages linked to sex, as it pursues more general aims of substantive equality, which makes a reference to causation inappropriate. As an example, one may refer to the case law in *Bötel* and *Lewark,*[302] which challenged a measure that only continued to provide contractually agreed pay while completing work council related training, instead of pay for the actual hours spent on the training.[303] It was argued in these cases that the compensation was due to the voluntary (unpaid) and independent nature of the work council, but the CJEU in principle considered the measure to concern pay, and as such to discriminate against part-time workers. Following this argument, the concept does not require causation between the person's sex and the disadvantage.[304] Certainly, causation in indirect sex discrimination is not demonstrated by a link to the protected characteristics, but by reference to discriminatory outcomes and the lack of an objective justification. The disadvantages linked to sex that are recognised under its scope are wide. The causation principle then mainly asks whether the disadvantage indeed falls within the scope of responsibility of the duty bearer in question. Since *Bötel* and *Lewark*[305] focused on national legislation, it is not too surprising that the CJEU took a broad view on these matters. As such, the cases demonstrate

297 Ellis, E. and Watson, P. (2012) EU Anti-Discrimination Law (2nd edn, Oxford University Press) p. 169.
298 Fredman, S. (2016) 'Substantive Equality Revisited' 14(3) *International Journal of Constitutional Law* 712 p. 735.
299 Ellis, E. and Watson, P. (2012) *EU Anti-Discrimination Law* (2nd edn, Oxford University Press) p. 173.
300 See discussion above.
301 Schiek, D. (2007) 'Indirect Discrimination' in Schiek, D., Waddington, L. and Bell, M. (eds) *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Ius Commune Casebooks for the Common Law of Europe (Hart Publishing) pp. 323, 441-443.
302 Judgment of 4 June 1992, *Bötel*, C-360/90, ECLI:EU:C:1992:246; judgment of 6 February 1996, *Lewark*, C-457/93, ECLI:EU:C:1996:33.
303 See section 4.3.1 above.
304 Rebhahn, R., and Kietaibl, C. (2010) 'Mittelbare Diskriminierung und Kausalität' (Indirect discrimination and causality) 4 *Rechtswissenschaft* p. 388.
305 Judgment of 4 June 1992, *Bötel*, C-360/90, ECLI:EU:C:1992:246; judgment of 6 February 1996, *Lewark*, C-457/93, ECLI:EU:C:1996:33.

how indirect sex discrimination law can have redistributive consequences, even if it is primarily aimed at ensuring cultural recognition and not economic social welfare, as suggested above.[306]

The CJEU has not clearly endorsed either the causation or the justification approach.[307] While earlier case law focused on justification, the CJEU in *Kenny* seems to implicitly acknowledge the causation approach. Specifically it held, that it was 'not a question of justifying the rate of remuneration paid to the different groups of comparators or the deployment of workers to one group or the other, but rather of justifying the difference in pay in itself.' By reference to *Brunnhofer*,[308] which concerned direct discrimination, the Court then continued to state that the difference in pay must be justified by objective factors unrelated to any discrimination linked to the difference in sex but that in the context of indirect discrimination 'there may be diverse reasons for the difference in pay and the justification for such difference may be equally diverse'. It then concluded that it is up to 'the employer to provide objective justification for the difference in pay between the workers who consider that they have been discriminated against and the comparators.'[309] Accordingly, the Court draws a distinction between a prima facie case of sex discrimination and a possible rebuttal via the objective justification test.

Whether the distinction between a causation and a justification approach has any real relevance in practice has been questioned in the literature.[310] There is no prima facie reason to suggest that one approach provides for a stricter application of the objective justification than the other. In practice, the causation approach may retain the danger that national courts engage little with de facto disadvantages as long as a justification can be identified. This would then make a detailed engagement with the proportionality considerations very difficult. It may also overemphasise the relevance of the traditional understanding of causation within the first stage of the indirect sex discrimination test, i.e. to require causation for the establishment of a prima facie case of indirect sex discrimination and before the evaluation of any objective justification.[311] However, such an approach would demonstrate a misunderstanding of the role of causation within the context of indirect sex discrimination. A prima facie case of indirect sex discrimination is established if there is a link between an apparently neutral practice and a disadvantage as well as a correlation between those that suffer the disadvantage and persons of a specific sex.

Some Member States' legal definitions treat objective justification as an exception (e.g. **Netherlands**, **Portugal**) while most closely aligned their national definition with the definitions of the EU equality directives. Others may more specifically lean towards the 'causation' approach. In that regard, **Czechia's** legal definition clearly states that indirect discrimination 'shall not be considered to occur if such a provision, criterion or practice is objectively justified.'[312] However, the legal definition does not prevent courts from treating objective justification as an exception (justification proper)[313] or as part of the legal definition.[314] Some national courts are inclined to consider the objective justification first and thus without reference to the de facto (potentially severe) consequences of the measure.[315] Overall, it is not suggested

306 See section 3.5 above.
307 However, AG Jacobs has endorsed the causation approach in Opinion of 6 July 2000, *Schnorbus*, C-79/99, ECLI:EU:C:2000:370.
308 Judgment of 26 June 2001, *Brunnhofer*, C-381/99, ECLIEU:C:2001:358.
309 Judgment of 28 February 2013, *Kenny and Others*, C-427/11, ECLI:EU:C:2013:122 paras 38-41.
310 Tobler, C. (2005) *Indirect Discrimination* (Intersentia) p. 258.
311 See, for example, the difficulties within the German context, discussed in section 4.3.3 above.
312 **Czechia's** Anti-Discrimination Act, Section 3(1). See also Section 7(4) of the **Finnish** Act on Equality between Women and Men (609/1986) according to which the means mentioned under Section 7(3) are not considered discriminatory if they are used to achieve an acceptable aim, and if the means taken are appropriate and necessary to achieve that aim.
313 E.g. **Polish** and **Romanian** Questionnaire to this report.
314 E.g. **French** Questionnaire to this report. The Court now always cites the whole definition of indirect discrimination in the case including the objective justification, see more recently, Court of Cassation, No. 18-15682 14 November 2019, https://www.courdecassation.fr/jurisprudence_2/arrets_publies_2986/chambre_sociale_3168/2019_9139/novembre_9548/1567_14_43913.html. However, the de facto application of the test nevertheless varies. Court of Cassation No. 10-23013, 3 July 2012 on indirect sex discrimination linked to a retirement supplement not awarded to part-time workers and no objective justification was found. Court of Cassation n° 10-21489, 6 June 2012, concerning the refusal to affiliate social workers to a managers' pension fund, Mercat-Bruns, M. (2012) 'Why do some female dominated jobs not fit in the framework of management?' (Pourquoi certains métiers féminisés ne rentrent pas dans le cadre?) 35 *JCP* 908.
315 E.g. **Croatian** and **Danish** Questionnaires to this report.

that this has made any practical difference regarding the strictness of the test. However, as seen above,[316] the issue of causation can create some confusion if it is also discussed in the context of the first stage establishing a prima facie case of indirect sex discrimination.

4.4.3 Variable standards of scrutiny?

According to the definition in Article 2(1)(b) Recast Directive 2006/54/EC, a measure, criterion or practice can be justified if there is a legitimate aim and the means of achieving that aim are appropriate and necessary. This definition allows for a somewhat broader objective justification than the definition adopted in *Bilka.* In *Bilka*, the Court required the undertaking to provide objectively justified factors unrelated to any discrimination on grounds of sex and show that the measures taken 'correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objective pursued and are necessary to that end.'[317]

However, the Court has used a different, somewhat less strict formula regarding objective justification of Member States' legislation that creates a 'particular disadvantage'. Namely, it required 'a necessary aim of the State's social policy and that [the measures] are suitable and requisite for attaining that aim'[318] or that a State 'could reasonably consider that the means chosen were suitable for attaining that aim.'[319] In previous cases, it has held that Member States enjoy a broad margin of discretion in their choice of measures of social policy and that it is thus sufficient if the national legislature reasonably considers a measure to be necessary to achieve its legitimate aims.[320] This has been criticised for diluting the test, as the necessity requirement is not recognised throughout and States only need to reasonably assume that their measures are suitable.[321] However, it may simply be seen as a consequence of the Member States' primary competence to develop social and employment policies that it is implied that they 'enjoy a reasonable'[322] or 'broad margin of discretion within exercising that power'.[323] This may be true especially regarding social benefits that ensure minimum maintenance.[324] Moreover, some authors have questioned whether the slightly different phrasing de facto amounts to a qualitative difference.[325] Recent case law also questions whether different approaches can in fact be discerned. For example, in *Brachner* and *Leone* the Court required a legitimate social-policy objective and appropriate and necessary measures. Moreover, the Court held that a 'factor can be considered appropriate to achieve the stated aim only if it genuinely reflects a concern to attain that aim pursued in a consistent and systematic manner.'[326] The courts can thus potentially question the existence of the aim itself, even if it would indeed be legitimate, and consider whether the measures taken indeed serve that aim. Consistency within the measure's application in relation to the aim is then specifically important. For example, in *Leone*, the CJEU questioned the consistency because maternity leave already triggered a number of other benefits and the legislation mainly aimed at aligning the national provisions with EU law requirements without significantly changing the available benefits themselves. Such a test does not look very different to the objective justification test within the context of the private employment market. The subsequent assessment in

316 See section 4.4.2 above.
317 Judgment of 13 May 1986, *Bilka* v *Weber von Hartz,* C-170/84, ECLI:EU:C:1986:204 para 36.
318 Judgment of 13 July 1989, *Rinner-Kühn* v *FWW Spezial-Gebäudereinigung*, C-171/88, ECLI:EU:C:1989:328 para 14.
319 Judgment of 9 February 1999, *Seymour-Smith and Perez*, C-167/97, ECLI:EU:C:1999:60 para 77.
320 Judgment of 14 December 1995, *Nolte* v *Landesversicherungsanstalt Hannover*, C-317/93, ECLI:EU:C:1995:438; judgment of 14 December 1995, C-444/93, *Megner and Scheffel* v *Innungskrankenkasse Vorderplatz,* ECLI:EU:C:1995:442.
321 Barnard, C. and Hepple, B. (2000) 'Substantive Equality' 59(3) *Cambridge Law Journal* p. 574; Schiek, D. (2007) 'Indirect Discrimination' in Schiek, D., Waddington, L. and Bell, M. (eds) *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Ius Commune Casebooks for the Common Law of Europe (Hart Publishing) pp. 323, 447; Ellis, E. and Watson, P. (2012) *EU Anti-Discrimination Law* (2nd edn, Oxford University Press) p. 240.
322 Judgment of 26 September 2000, *Kachelmann*, C-322/98, ECLI:EU:C:2000:495, para 30.
323 Judgment of 11 September 2003, *Steinicke*, C-77/02, ECLI:EU:C:2003:458, para 61; judgment of 20 March 2003, *Kutz-Bauer*, C-187/00, ECLI:EU:C:2003:168, para 55; For similar points regarding the EU legislature, see judgment of 9 September 2003, *Rinke*, C-25/02, ECLI:EU:C:2003:435, paras 38-43.
324 See discussion in judgment of 20 October 2011, *Brachner*, C-123/10, ECLI:EU:C:2011:675, paras 87-93.
325 Tobler, C. (2005) *Indirect Discrimination* (Intersentia) p. 210.
326 Judgment of 20 October 2011, *Brachner*, C-123/10, ECLI:EU:C:2011:675, paras 70-71; judgment of 17 July 2014, *Leone*, C-173/13, ECLI:EU:C:2014:2090, paras 53-55.

Leone certainly looked at the requirements in detail and thus reflects a tendency to strengthen the test of objective justification in recent case law. If that is correct, the difference between the review of employer polices and social policy may largely depend on the role of the duty bearer. An employer, including a public employer, may pursue business-related aims, while the legislature may focus on more general social policy aims. However, this does not affect the strictness of the test in the light of *Brachner* and *Leone*.

However, some case law suggests that the strictness of the assessment is sometimes altered depending on the role of the duty bearer. Tendencies to accept inequalities within schemes of general welfare and minimum protection more easily in the past can be identified. For example, the **Belgium** system of unemployment and sickness-invalidity benefits does not depend only on working years and contributions but also on the number of dependants and whether one is cohabiting. There is no doubt that the latter measure disadvantages women, but in 1991 it was considered to be justified by the CJEU, as it was a needs-based system that took into account the entire family income. Specifically, the Court accepted that in this area of social policy the Member State enjoyed 'a reasonable margin of discretion as regards both the nature of the protective measures and the detailed arrangements for their implementation.'[327] It has been argued that this case and the rather lax review of the objective justification has seriously undermined the development of indirect sex discrimination within the Member State.[328]

4.4.4 Scope of objective justification

The **legitimate aim**, as the entire objective justification, has to be unrelated to sex.[329] Mere general statements are insufficient to show that the aim is unrelated to any discrimination on the ground of sex or to furnish evidence enabling a reasonable conclusion that the means chosen were appropriate for achieving that aim.[330] For example, general assumptions about part-time workers and their reduced contribution to household income or integration within the undertaking cannot justify their differential treatment as the assumption does not offer any objective reasons.[331] Despite the broader legal definition of legitimate aim,[332] the Court often focuses on a real need of the employer as developed in *Bilka*.[333] In principle, there are diverse legitimate aims and business needs that could be recognised. These extend from all types of overriding business interests[334] to good industrial relations[335] and state of the employment market,[336] and are even wider where social policy aims are concerned. In *Leone*, the CJEU did suggest that it was relevant that the provision, granting additional pension credits for taking at least two months of childcare related leave, was introduced following the judgment in *Griesmar*,[337] and could thus be construed as aiming at avoiding some of the financial consequences of the previous judgment. Specifically, it questioned whether the credit was indeed aimed at pension disadvantages related to the leave, given that the periods of leave were already credited within the pension entitlements. It thus suggested that the aim in *Griesmar* had shifted only slightly, as the latter focused on compensation for the career-related disadvantages suffered by women because they took time out to bring up their children in the course of their career, while the provision considered in *Leone* included some male civil servants.[338]

327 Judgment of 7 May 1991, *Commission* v *Belgium* C-229/89, ECLI:EU:C:1991:187, para 22.
328 **Belgian** Questionnaire to this report.
329 Judgment of 13 May 1986, *Bilka* v *Weber von Hartz,* C-170/84, ECLI:EU:C:1986:204.
330 Judgment of 17 July 2014, *Leone*, C-173/13, ECLI:EU:C:2014:2090 para 59; judgment of 9 February 1999, *Seymour-Smith and Perez*, C-167/97, ECLI:EU:C:1999:60 para 76; judgment of 10 March 2005, *Vasiliki Nikoloudi* v *Organismos Tilepikoinonion Ellados*, C-196/02, ECLI:EU:C:2005:141 para 52.
331 Judgment of 13 July 1989, *Rinner-Kühn* v *FWW Spezial-Gebäudereinigung*, C-171/88, ECLI:EU:C:1989:328; In its judgment of 27 June 1990, *Kowalska*, C-33/89, ECLI:EU:C:1990:265 the assessment was left to the national court.
332 See above, 4.4.3.
333 Judgment of 28 February 2013, *Kenny and Others*, C-427/11, ECLI:EU:C:2013:122 para 46 with reference to judgment of 13 May 1986, *Bilka* v *Weber von Hartz,* C-170/84, ECLI:EU:C:1986:204 paras 36-37.
334 Judgment of 17 October 1989, *Handels- og Kontorfunktionærernes Forbund i Danmark* v *Dansk Arbejdsgiverforening* for *Danfoss*, C-109/88, ECLI:EU:C:1989:383.
335 Judgment of 28 February 2013, *Kenny and Others*, C-427/11, ECLI:EU:C:2013:122.
336 Judgment of 27 October 1993, *Enderby* v *Frenchay Health Authority and Secretary of State for Health*, C-127/92, ECLI:EU:C:1993:859.
337 Judgment of 29 November 2001, *Griesmar*, C-366/99, ECLI:EU:C:2001:648.
338 Judgment of 17 July 2014, *Leone*, C-173/13, ECLI:EU:C:2014:2090, paras 63-68.

Once the legitimate aim is identified, the measures taken need to be appropriate and necessary to achieve the aim. **Appropriateness** predominantly focuses on the suitability of the measure. Consistency is a key concern here, as the objective justification must relate to all people who are included in the comparison to demonstrate the relative group disadvantage.[339] Measures are appropriate and necessary if they 'genuinely reflect a concern to attain that aim and be pursued in a consistent and systematic manner in the light thereof'.[340] A measure would be applied in a consistent and systematic manner, if there is no over or under inclusion and it directly relates to the proclaimed aim. For example, a pension increase to reflect the current consumer price index cannot exclude some pensioners because they live longer or contributed less towards their pension, since these factors have nothing to do with the current consumer prices.[341] The measures thus need to be consistent in the light of the proclaimed aim and cannot be justified by different and additional reasons. The arbitrary inclusion or exclusion of groups or a too broad or narrow application of the measure given the proclaimed aim are thus suspect.

Considering appropriateness in more general terms, *Danfoss* provided an interesting distinction when confronted with a mobility criterion to justify pay discrimination. In this context, the meaning of mobility included not simply flexibility regarding working time, but also indicators such as enthusiasm for work, initiative and amount of work done. The Court considered that where such a criterion 'systematically works to the disadvantage of women that can only be because the employer has misapplied it. It is inconceivable that the quality of work done by women should generally be less good. The employer cannot therefore justify applying the criterion of mobility, so understood, where its application proves to work systematically to the disadvantage of women.'[342] Accordingly, it was not appropriate for rewarding mobility. On the other hand, if mobility rewards the employee's different adaptability to variable hours, women may still be disadvantaged due to childcare responsibilities, but the employer may still justify it if they can show that it reflects a real need. The question is then whether the mobility criterion is suitable to achieve the specific aim. In that regard, mere generalisations concerning the capacity of a specific measure are not enough to demonstrate their suitability.[343]

Similarly, a recent **Danish** decision draws a distinction between perceived and de facto lack of flexibility.[344] In the case, a single mother was made redundant because the company assumed that she was unable to demonstrate the flexibility required following the restructuring of the company. Within its finding of indirect sex discrimination, the court specifically highlighted that the company drew its conclusion without prior consultation with the employee. This seems to suggest that a de facto lack of flexibility that was identified in consultation with the employee could have led to a different conclusion. However, this should not have saved the employer from justifying the need for the flexibility requirement itself.

Necessity essentially requires the consideration of less harmful or harmless measures to achieve the same aim. It is a strict test. The capacity of certain measures to achieve an aim is not sufficient to demonstrate their necessity.[345] The national court needs to consider whether less severe measures are able to achieve the same aim.[346] For example, the case of *Elbal Moreno*[347] concerned Spanish statutory pension schemes, which required a greater contribution period from part-time workers and also reduced their pension entitlements in proportion to the part-time nature of their work. De facto, this excluded Ms Elbal Moreno from any possibility of obtaining a retirement pension. While the protection of the contributory social security system was certainly a legitimate aim, the CJEU queried whether there was

339 Judgment of 28 February 2013, *Kenny and Others*, C-427/11, ECLI:EU:C:2013:122, para 45.
340 Judgment of 17 July 2014, *Leone*, C-173/13, ECLI:EU:C:2014:2090.
341 Judgment of 20 October 2011, *Brachner*, C-123/10, ECLI:EU:C:2011:675, paras 76-86.
342 Judgment of 17 October 1989, *Handels- og Kontorfunktionærernes Forbund i Danmark* v *Dansk Arbejdsgiverforening* for *Danfoss*, C-109/88, ECLI:EU:C:1989:383.
343 Judgment of 9 February 1999, *Seymour-Smith and Perez*, C-167/97, ECLI:EU:C:1999:60 para 76.
344 **Danish** Eastern High Court, BS-17466/2019-OLR, Judgment of 7 September 2020.
345 Judgment of 20 March 2003, *Kutz-Bauer*, C-187/00, ECLI:EU:C:2003:168; judgment of 9 February 1999, *Seymour-Smith and Perez*, C-167/97, ECLI:EU:C:1999:60; judgment of 27 June 1990, *Kowalska*, C-33/89, ECLI:EU:C:1990:265.
346 Judgment of 11 September 2003, *Steinicke*, C-77/02, ECLI:EU:C:2003:458.
347 Judgment of 22 November 2012, *Elbal Moreno*, C-385/11, ECLI:EU:C:2012:746.

truly no less onerous measure available that could achieve the same objective. As the suitability and necessity requirement are part of the general proportionality test, proportionality concerns in the narrow sense can play a part within the analysis. Specifically, a measure is often not appropriate or necessary if it creates a significant burden that is disproportionate to the achieved aim.

The final assessment of the objective justification is left to the national court. They are thus required to make their own assessment. This can mean that national courts find an objective justification even if the CJEU suggested that there was none. For example, the **French** case law, following the *Leone* judgements, indeed considered the measure to be objectively justified. While the Council of State accepted that maternity and adoption leave could attract pension rights, it did not consider this to be as crucial as the CJEU did, as the fact remains that women with one or more children progress more slowly in their careers than men, and their pensions are thus lower. Accordingly, it accepted the French Government's justification.[348]

Many of the CJEU cases consider whether a 'particular disadvantage' can be justified by reference to **budgetary considerations**, especially regarding the exclusion of part-time workers.[349] Accepting such justifications in general would weaken the concept of indirect discrimination law significantly, since there will always be an interest in reducing costs. Accordingly, the CJEU has generally rejected financial concerns as a justification.[350] For example, in *Roks*, it emphasised that although budgetary concerns can influence the choice of social policy and the scope of social protection 'they cannot themselves constitute the aim pursued by that policy and cannot, therefore, justify discrimination against one of the sexes.'[351] Otherwise, the application of the equality principle would depend on the financial health of the Member State.[352] However, many legitimate business interests are of a financial nature as they reflect an economic need and they need to be distinguished from simple cost reduction. In *Jørgensen*,[353] after rejecting budgetary considerations to be a legitimate aim, the Court distinguished 'measures intended to ensure sound management of public expenditure on specialised medical care and to guarantee people's access to such care' from budgetary considerations and considered them to 'be justified if they meet a legitimate objective of social policy, are appropriate to attain that objective and are necessary to that end'.[354] The conversion of practices with a small turnover to part-time practices could thus be justified, as it ensured that the financial resources reached areas with the highest demand. These arguments are more closely related to the need for the effective running of a business or public service. Case law also accepts pressures within the employment market to justify pay differences. If the reduced pay is due to market forces, the increase in pay has to be proportionate to that market force. Otherwise the rule would still not be necessary.[355] The CJEU thus accepts that there may be situations where new recruitment requires higher offers of remuneration. However, this is less convincing if market forces are used to justify lower remuneration offers, due to flexibility within the labour market, as it would not reduce the employers' obligations to offer equal pay. This reasoning also makes equality dependent on the general economic situation and solidifies past disadvantages for the future.

348 Council of State, No. 372426, 27 March 2015.
349 Judgment of 20 March 2003, *Kutz-Bauer*, C-187/00, ECLI:EU:C:2003:168; judgment of 11 September 2003, *Steinicke*, C-77/02, ECLI:EU:C:2003:458; joined cases C-4/02 and 5/02, *Schönheit* and *Becker* [2003] ECLI:EU:C:2003:583; judgment of 10 March 2005, *Vasiliki Nikoloudi* v *Organismos Tilepikoinonion Ellados*, C-196/02, ECLI:EU:C:2005:141.
350 Judgment of 11 September 2003, *Steinicke*, C-77/02, ECLI:EU:C:2003:458; judgment of 17 June 1998, *Hill and Stapleton* v *Revenue Commissioners*, C-243/95, ECLI:EU:C:1998:298; judgment of 24 February 1994, *Roks,* C-343/92, ECLI:EU:C:1994:71.
351 Judgment of 24 February 1994, *Roks,* C-343/92, ECLI:EU:C:1994:71 para. 35.
352 Judgment of 24 February 1994, *Roks,* C-343/92, ECLI:EU:C:1994:71 paras 35-36. See also Judgment of 11 September 2003, *Steinicke*, C-77/02, ECLI:EU:C:2003:458; judgment of 17 June 1998, *Hill and Stapleton* v *Revenue Commissioners*, C-243/95, ECLI:EU:C:1998:298.
353 Judgment of 6 April 2000, *Jørgensen*, C-226/98, ECLI:EU:C:2000:191 para 41.
354 Judgment of 6 April 2000, *Jørgensen*, C-226/98, ECLI:EU:C:2000:191 paras 40-42.
355 Judgment of 27 October 1993, *Enderby* v *Frenchay Health Authority and Secretary of State for Health*, C-127/92, ECLI:EU:C:1993:859; judgment of 14 December 1995, *Nolte* v *Landesversicherungsanstalt Hannover*, C-317/93, ECLI:EU:C:1995:438.

The above raises the more fundamental question as to who should bear the cost of non-discrimination law.[356] Accepting economic justifications in general ignores the fact that structural inequalities make it unlikely for markets to produce gender-neutral results and ignores the duty on employers to ensure a discrimination-free environment within the workplace. However, it also seems unreasonable to burden private employers alone with the cost of structural or systemic gender inequality, if doing so would indeed damage their business. If the price is too high, one may thus be inclined to allow employers to justify their actions because of (financial) business needs. The key question will be that of necessity. The causation approach would attribute the 'particular disadvantage' to the actions of the duty bearer (e.g. the employer or the state) if less harmful measures are available. Alternatives can potentially take a broad view, including restructuring, reclassification or refinancing different expenditures and benefits. This could allow for strict scrutiny of business management as well as public expenditure. For example, Member States' austerity measures can be challenged under the scope of indirect sex discrimination law if they create particular disadvantages for women, say because women are more likely to belong to the poorer part of society. While budgetary constraints or savings may constitute a necessity, the measures could then not be justified if there were alternative saving opportunities available that would have a less detrimental effect on women.[357] The strictness of the necessity requirement thus needs to be taken seriously and assessed with reference to the entire business operation to strike a fair balance between legitimate business concerns and the need to prevent private and public market participants from reinforcing systemic or structural discrimination.

The use of **seniority** to reward experience and better performance has been the subject of a number of cases. In its earlier case law, such as *Danfoss*, the CJEU considered that 'length of service goes hand in hand with experience and generally enables workers to perform their tasks better'.[358] However, in *Nimz*, the Court rejected the employer's attempt to justify a different calculation of seniority for the purpose of a higher salary group with the argument that full-time workers acquired job-related skills more quickly than part-time workers, stating that this constituted a mere generalisation. It especially emphasised that 'the objectivity of such a criterion depends on all the circumstances in a particular case, and in particular on the relationship between the nature of the work performed and the experience gained from the performance of that work upon completion of a certain number of working hours.'[359] This was confirmed in *Nikoloudi*, where the Court reasoned that the objectivity of seniority as a criterion for differential treatment depends on the circumstances of each individual case.[360] The Court emphasised the need to individually assess the nature of the duties carried out and the experience that has been gained after performing that task for a certain time.[361] General assumptions that there is a connection between seniority and experience or expertise do not constitute an objective criterion independent from any discrimination on the ground of sex.[362] Contrary to the **Spanish** Supreme Court,[363] the CJEU considered that if seniority is taken into account (in this case in relation to seasonal contracts), the fact that part-time workers only work certain days of the week (so called vertical part-time work) cannot work to their disadvantage.[364] The finding is relevant for other Member States, too.[365] Certainly, it is not obvious why vertical part-time workers should be less loyal or experienced.

356 Tobler, C. (2005) *Indirect Discrimination* (Intersentia) p. 250.
357 Schiek, D. (2016) 'Revisiting intersectionality for EU Anti-Discrimination Law in an economic crisis –a critical legal studies perspective' *Sociologia del Diritto*, 2016(2), p. 38. Available at: https://doi.org/10.3280/SD2016-002003.
358 Judgment of 17 October 1989, *Handels- og Kontorfunktionærernes Forbund i Danmark* v *Dansk Arbejdsgiverforening* for *Danfoss*, C-109/88, ECLI:EU:C:1989:383.
359 Judgment of 7 February 1991, *Nimz* v *Freie und Hansestadt Hamburg*, C-184/89, ECLI:EU:C:1991:50 para 14; see also judgment of 2 October 1997, *Gerster* v *Freistaat Bayern*, C-1/95, ECLI:EU:C:1997:452 para 39; judgment of 17 June 1998, *Hill and Stapleton* v *Revenue Commissioners*, C-243/95, ECLI:EU:C:1998:298.
360 Judgment of 10 March 2005, *Vasiliki Nikoloudi* v *Organismos Tilepikoinonion Ellados*, C-196/02, ECLI:EU:C:2005:141 para 55.
361 Judgment of 10 March 2005, *Vasiliki Nikoloudi* v *Organismos Tilepikoinonion Ellados*, C-196/02, ECLI:EU:C:2005:141 para 61.
362 Judgment of 3 October 2019, *Schuch-Ghannadan*, C-274/18, ECLI:EU:C:2019:828 para 39.
363 **Spanish** Supreme Court 1004/2018, of 13 March 2018 (Rec. 77/2017) – ECLI: ES:TS:2018:1004.
364 Joined cases C-439/18 and 472/18, *Agencia Estatal de Administración Tributaria – AEAT* [2019], ECLI:EU:C:2019:858. See also in a rather different context, judgment of 9 November 2017, *Espadas Recio*, C-98/15, ELCI:EU:C:2017:833.
365 E.g. In **Belgium** this would concern 'voluntary' part-time workers as the system of 'compressed days' in effect reduce the career duration of this category of workers, predominantly female.

However, in *Cadman*, on seniority concerned with full-time work only, the CJEU returned to its previous consideration in *Danfoss*, but clarified that there may be situations where seniority as a criterion for higher pay requires specific justification, for example if 'the worker provides evidence capable of raising serious doubts about the link between length of service and performance.'[366]

[W]here a job classification system based on an evaluation of the work to be carried out is used in determining pay, it is not necessary for the justification for recourse to a certain criterion to relate on an individual basis to the situation of the workers concerned. Therefore, if the objective pursued by recourse to the criterion of length of service is to recognize experience acquired, there is no need to show in the context of such a system that an individual worker has acquired experience during the relevant period which has enabled him to perform his duties better. By contrast, the nature of the work to be carried out must be considered objectively.[367]

While this may enable some more nuanced considerations compared to *Danfoss*, the Court's approach concerning different seniority for part-time and full-time workers seems to be much more open to a particular assessment of the specific tasks and its relationship to skills and experience.[368] Outside the scope of working time per week, it thus approached seniority and experience almost as synonyms and ignores the discriminatory structures that often make it more difficult for women to have their seniority recognised, as well as the fact that not all performances improve over the years. Similar distinctions have been identified at the national level. For example, the **Belgian** courts consider seniority to be an objective criterion consisting of the age of the uninterrupted working relationship between a worker and his/her employer. However, it must be calculated according to the number of years worked and not the number of hours worked during a year, as this would be against the principle of proportionality enshrined in the Collective Agreement.[369]

More recently, the CJEU has recognised that mere presence at work does not necessarily ensure better performance.[370]

In *Schnorbus*, the CJEU seems to suggest that measures aimed at **compensation for previous disadvantages** can be justified.[371] It largely adopted the language of positive action and considered the priority given to a male applicant who underwent compulsory military or civil service as 'objective in nature and prompted solely by the desire to counterbalance to some extent the effects of that delay.'[372] As the CJEU adopts a symmetric understanding of equality within the context of EU non-discrimination law, it did not require further elaboration why military service indeed constitutes a disadvantage that requires compensation. There is thus no further exploration of the structural gender inequality that disadvantages women in practical terms, even if not formally, while simultaneously leaving men 'unharmed' even if they experience formal disadvantages (such as delayed start of studies due to military service). Specifically, the Court rejected any comparison between past delays because of military service and hypothetical potential future delays because of maternity and childcare. While this may be understandable given the hypothetical nature of future maternity and childcare responsibilities, the distinction between parental leave and military service was on the other hand upheld in ÖGB,[373] even though it only concerned past leave.

366 Judgment of 3 October 2006, *Cadman*, C-17/05, ECLI:EU:C:2006:633, paras 37-38.
367 Judgment of 3 October 2006, *Cadman*, C-17/05, ECLI:EU:C:2006:633, para 39.
368 Ellis, E. and Watson, P. (2012) *EU Anti-Discrimination Law* (2nd edn, Oxford University Press) pp. 238-239.
369 It relied on Council Directive 97/81/EC of 15 December 1997 concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC, OJ L 14, 20.1.1998, pp. 9-14. See Labour Court of Liège, 18 December 2006, *Chroniques de droit social/Sociaalrechtelijke Kronieken*, 2008, p. 83, with Jean Jacqmain's case note.
370 Judgment of 20 June 2013, *Riežniece*, C-7/12, ECLI:EU:C:2013:410.
371 McCrudden, C. (2019) *Gender-based positive action in employment in Europe* (European Commission, European network of legal experts in gender equality and non-discrimination) p. 66.
372 Judgment of 7 December 2000, *Schnorbus*, C-79/99, ECLI:EU:C:2000:676 para 44.
373 Judgment of 8 June 2004, Österreichischer Gewerkschaftsbund, C-220/02, ECLI:EU:C:2004:334.

Moreover, compensatory measures cannot justify all actions. In *Leone*, the CJEU did not consider purely financial compensatory measures (in form of extra pension payments) because of past leave related to childcare to constitute a positive action measure, because they do not 'provide a remedy for the problems which civil servants may encounter in the course of their professional life.'[374] The question is then whether the particular disadvantage can still be justified under the scope of indirect sex discrimination. In that regard, the Court accepted that compensation for disadvantages suffered by workers who have taken 'career breaks for a period of time in order to devote themselves to bringing up their children indeed constitutes a legitimate social policy aim.' However, it questioned whether this was indeed the aim of the policy, given that it was simply adopted to avoid the financial consequences of the decision in *Griesmar*,[375] granted one year of credit respectively from the length of leave actually taken, and treated all leave as the same, despite different pay, seniority and pension entitlements. It also suggested that the policy continued to advantage women as it also recognised entitlements for leave taken during their studies.[376] The Court thus rejected the objective nature of the measure. It was not further considered whether this constituted a protective measure in relation to maternity and pregnancy.[377]

A careful distinction must be drawn between compensatory measures and measures that are advantageous for one sex. This can be also be relevant regarding the necessity and appropriateness of the measure. For example, in *Kachelmann*, the Court considered the separate assessment of part-time and full-time workers for selection for socially reconcilable dismissal. The claimant was dismissed because, among the group of part-time workers, her dismissal was the most socially reconcilable. However, if both full-time and part-time workers had been considered together, another employee, who worked full time, would have been dismissed. The claimant further argued that she was willing work full time. The separate consideration of full-time and part-time workers was thus not necessary. However, the CJEU rejected such an argument as it would give part-time workers an unreasonable advantage: it could potentially transform their contract into full-time employment by unilateral agreement, as, at times, the employer would have no choice but to offer them a full-time contract.[378] A broad consideration of the social circumstances allows us to recognise this as a potential advantage, since not all part-time employment is voluntary and employees are usually unable to unilaterally transform their part-time contract into a full-time contract.

In a similar vein, one could wonder whether the apparent disadvantage in *Schnorbus* indeed constitutes a disadvantage within broader social circumstances. Although the conscription duty delayed the initial start of the studies, the service did provide valuable training, work experience, and pay and there was no evidence that it carried long-term disadvantages. The recognition of military service is even less convincing since similarly constituted disadvantages due to parental leave are not treated in the same way.

Overall, the CJEU's assessment thus provides little in the way of specific guidelines for the Member States. Even if the justification is strict, the discretion of national courts may lead to very different results. Some have tried to provide further legal guidance regarding the scope of a possible objective justification. For example, the **German** Pay Transparency Act indicates that prima facie indirect pay discrimination can be justified by reasons related to the labour market, performance and results, as long as the principle of proportionality is respected.[379] This seems to summarise some of the CJEU case law discussed above. However, it also confuses the issue of establishing a prima facie case of indirect sex discrimination and its objective justification. After all, issues of performance and results may already question the equal value of the work and thus raise issues in relation to the correct pool of comparators.

374 Judgment of 17 July 2014, *Leone*, C-173/13, ECLI:EU:C:2014:2090, paras 99-103; McCrudden, C. (2019) *Gender-based positive action in employment in Europe* (European Commission, European network of legal experts in gender equality and non-discrimination), p. 72.
375 Judgment of 29 November 2001, *Griesmar*, C-366/99, ECLI:EU:C:2001:648.
376 Judgment of 17 July 2014, *Leone*, C-173/13, ECLI:EU:C:2014:2090, paras 58-79.
377 As suggested by Advocate General Jääskinen, opinion of 27 February 2014, C-173/13, *Leone* ECLI:EU:C:2014:117.
378 Judgment of 26 September 2000, *Kachelmann*, C-322/98, ECLI:EU:C:2000:495, paras 31-35.
379 **Germany**, Pay Transparency Act of 30 June 2017, Section 3(3), Official Journal 2017, p. 2152, https://www.gesetze-im-internet.de/entgtranspg/BJNR215210017.html.

In general, at national level there seems to be a trend to focus on the legitimacy of the aim only, without a detailed focus on the appropriateness or necessity of a measure.[380] This includes criteria that have received detailed scrutiny by the CJEU, such as seniority and job classification systems that consider male-dominated tasks to be more sophisticated or more advanced. Moreover, the strictness of the appropriateness and necessity test is not always appreciated. For example, **Polish** courts seem to focus at times on the reasons why the imbalance occurred rather than the appropriateness and necessity. Thus, ending a strike and providing 'social peace' could constitute a justification as well as different finance systems for different types of doctors.[381] In the **UK**, while the need for the reasonable necessity of a measure has been recognised by the Supreme Court,[382] a study concerned with cases in the Employment Tribunal and Employment Appeal Tribunal suggests that the necessity criterion is not applied strictly.[383] Specifically, necessity is confirmed even if less disadvantaging measures are available and the seriousness of the impact of the measure is not always considered.[384] Indirect sex discrimination thus struggles to address issues of inequality beyond disadvantages that are obviously linked to gender roles.[385] In a **Finnish** case concerned with municipal redundancies within a department that was 90 % female (but were not imposed on a department that was 90 % male), the Finnish court considered the measure to be justified because the budget objectives were the same for all departments and there were objective grounds to reduce expenses. If the court had applied the objective justification test strictly, it would have had to consider issues such as the necessity of dismissing the female employees and whether the economic objective could have been achieved by non-discriminatory measures.[386]

French courts, on the other hand, have long rejected effective business management or seniority (i.e. reward of experience) as justifications and also demonstrate more flexibility regarding *Leone*-type compensatory measures that are potentially viewed as positive action that is implemented as legitimate aim.[387] As such it seems to adopt a much more asymmetrical understanding compared to the CJEU approach. However, it also leaves great discretion to companies to identify potential legitimate aims. In a case on the classification of mostly male technician staff as managers while excluding mostly female social workers from the same categorisation, the Court of Cassation argued that affiliation to a non-manager occupational pension fund for social workers may be justified for the coherence and the survival of the pension system.[388] However, it nevertheless questioned the suitability of this system, observing first that employers used the same type of discriminatory categorisation within other collective agreements and secondly, that the application of the category of non-managers to social workers was not coherent. The court found that it did not reflect the leadership initiatives of social workers as compared to technicians at the same level who only execute supervisors' decisions.[389]

4.5 Consequences of a successful claim of indirect sex discrimination

Once a claim of indirect sex discrimination has been successful, one may wonder what remedy must be applied. Since indirect sex discrimination law is based on comparative disadvantages, any discrimination

380 **German** and **Slovakian** Questionnaires to this report.
381 **Polish** Supreme Court judgment of 7 December 2011, II PK 77/11; 29 March 2011, I PK 231/10, OSNP 2012 No. 9-10, item 118; TSO 2013 No. 1, item 6.
382 **UK** Supreme Court, *Homer* v *Chief Constable of West Yorkshire Police and West Yorkshire Police Authority* [22].
383 Lane, J. and Ingleby, R. (2018) 'Indirect Discrimination, Justification and Proportionality: Are UK Claimants at a Disadvantage?' 47(4) *Industrial Law Journal* 531.
384 **UK** Employment Appeal Tribunal, *Burch* v *Tesco Stores Ltd* [2000] UKEAT 793; *Bradley* v *London School of English and Foreign Languages Ltd* [2018] 5 WLUK 242 did indeed consider the seriousness of the impact.
385 See **Croatian** Questionnaire to this report.
386 See **Finnish** Report referring to Anttila, O. (2013) *Kohti tosiasiallista tasa-arvoa? Sukupuolisyrjinnän kiellot oikeudellisen pluralismin aikana Suomalainen lakimiesyhdistys* (Finnish Bar Association), pp. 306-308; Schiek, D. (2007) 'Indirect Discrimination' in Schiek, D., Waddington, L. and Bell, M. (eds) *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Ius Commune Casebooks for the Common Law of Europe (Hart Publishing). pp. 456-460.
387 **French** Questionnaire to this report; Xenidis, R. and Masse Dessen, H. (2018) 'Positive action in practice: some dos and don'ts in the field of gender equality' 2 *European Equality Law Review* 36.
388 Court of Cassation, social chamber, 6 June 2012, No. 10-21.489, JCP G, 2012, 908, commentary by Mercat-Bruns, M..
389 On the incoherent means of justification of affiliation to AGIRC and ARRCO, see Court of Cassation, social chamber, 6 June 2012, No. 10-21.489, JCP G, 2012, 908, commentary by Mercat-Bruns, M..

could in principle be abolished by reducing everyone's working conditions. EU non-discrimination law could thus potentially reduce employment protection overall in the interest of equality. This undesirable outcome has been discussed in the literature with reference to a potential obligation to level up or level down.

For example, Fredman criticises EU non-discrimination law for allowing levelling down in principle and suggests that the concept of dignity inherent in the notion of substantive equality should reject such an outcome. Discussing the potential position of a man who challenges the different male and female retirement age, she considers it insufficient to raise the retirement age for women because it would not help him and would also disadvantage older women as it prevents them from accessing their pension.[390] Such an approach seems attractive as it prevents disadvantages from being spread (the 'equal misery' defence)[391] and introduces a degree of minimum protection. However, it is somewhat at odds with the CJEU's understanding that indirect sex discrimination must not depend on the financial health of the Member State or employer. Specifically, since indirect sex discrimination law considers comparative disadvantages, it can be achieved regardless of any budgetary limitations. Accordingly, levelling down may at times be necessary, especially if some groups have received unreasonably high benefits at the expense of the disadvantaged group.[392]

Accordingly, it seems useful to distinguish between the rights of the claimants in the individual procedure and the need for long-term structural change. Regarding the former, the CJEU clearly requires levelling up, to satisfy the individual claimant's desire to access specific benefits that are withheld from them. For example, in *Kowalska*, the CJEU held that

> 'where there is indirect discrimination in a clause in a collective wage agreement, the class of persons placed at a disadvantage by reason of that discrimination must be treated in the same way and made subject to the same scheme, proportionately to the number of hours worked, as other workers, such scheme remaining, for want of correct transposition of Article 119 of the EEC Treaty into national law, the only valid point of reference.'[393]

However, that does not prevent the long-term equalisation of benefits that may carry disadvantages for some. For example, many Member States have equalised the male and female retirement age, a development that has been considered detrimental for some who had hoped to access their pension at an earlier date, while also being considered beneficial at it allows women to stay in the employment market for longer, which will increase their overall income as well as their pension. Moreover, the equalisation of benefits may also have the negative consequences envisioned by Fredman as discussed above. For example, in *Snell* v *Network Rail* (unreported), a policy of giving mothers on shared parental leave full pay but paying only statutory minimum pay to partners on the same scheme was found to be indirectly discriminatory. Consequently, the male claimant was entitled to the same pay as his wife on shared parental leave working for the same company. Subsequently, the company changed its policy to pay only the statutory minimum to both mothers and fathers.

4.6 Physical requirements and indirect sex discrimination

While disadvantages based on part-time work and parental leave have been the main focus of indirect sex discrimination, another heavily gendered criterion relates to physical abilities, namely strength and height. The early CJEU case of *Rummler*[394] already reviewed the use of so-called 'light work wage groups' to justify difference in pay between men and women. While there was of course scope to demonstrate

390 Fredman, S. (2011) *Discrimination Law* (2nd edn, Oxford, OUP), p. 21; Fredman, S. (2001) '"Equality": A New Generation?' 30(2) *Industrial Law Journal* 145, pp. 155–57.
391 Bell, M. (1999), 'Shifting Conceptions of Sexual Discrimination at the Court of Justice' 5(1) *European Law Journal* 63.
392 Further discussion, Mulder, J. (2017) *EU Non-Discrimination Law in the Courts* (Hart Publishing) pp. 29-30.
393 Judgment of 27 June 1990, *Kowalska*, C-33/89, ECLI:EU:C:1990:265.
394 Judgment of 1 July 1986, *Rummler* v *Dato-Druck*, C-237/85, ECLI:EU:C:1986:277.

that women's work did indeed require physical strength, the claimant instead challenged the reliance on physical strength as a differentiating criterion. While the CJEU accepted that physical demands could be a factor for wage classification, it considered the wage system to be discriminatory if it considered as relevant only those requirements that men could typically fulfil more easily but ignored requirements that women could typically fulfil more easily, such as dexterity. The need for work assessments free from gender biases was thus recognised early on and seems especially important in areas of the labour market that are highly segregated.

The recent *Kalliri* decision on height requirements to enter the Greek police force has reinvigorated the debate on physical requirements in some Member States. In this case, Ms Kalliri challenged a rule that required participants of a competition to enter the police force to be at least 1.70m.[395] When the case reached the CJEU, it had no problem in identifying a prima facie case of indirect sex discrimination, given that a much larger number of women than men are of a height of less than 1.70m. The Court accepted as an objective justification that the operational capacity and proper functioning of the police services constitutes a legitimate objective. However, regarding necessity and appropriateness, the Court questioned whether all positions in the police indeed required physical force and, if so, whether height was the right criterion to determine the ability to use physical force. The height criterion was considered even more suspect, given that the height requirements also varied at different times and between different forces. Accordingly, the CJEU strongly suggested that it could not be justified. This case addresses several dimensions of physical requirements. Firstly, it recognises that neutrally formulated requirements regarding strength and height can disadvantage women, if their different physical build is not taken into account. Secondly, it questions the use of physical strength – and its correlation with height in some cases – to determine value of work or work requirements given that it is a highly gendered criterion representing both the stereotypes that exist about men's and women's ability and the value of their work in relation to that ability.

The 'particular disadvantage' of **common height and fitness criteria** is easily demonstrated. Accordingly, an **Irish** case from 1979 had already identified the particular disadvantage connected to them and dismissed height as non-essential.[396] Since then, the height requirements for the police force (*An Garda Síochána*) have been replaced with physical competency tests, with different minimum standards for men and women. In **Greece**, common and gender-specific height criteria to enter the police and fire brigades were introduced after the directly discriminatory women quotas were abolished. These indirectly discriminatory rules have had a very similar effect to the previous quotas, as they prevent the large majority of women from accessing employment in these institutions.[397] Following the CJEU's *Kalliri* case, their legitimacy has recently been evaluated by the Greek Council of State. Both criteria are suspect under the scope of indirect sex discrimination law. The common height criterion obviously disadvantages women more than men, if they are less likely to be that height. Thus, in the case concerned in the *Kalliri* judgment, it was recognised that only 19 % of women but 80 % of men are over 1.70m as it is 7-8cm lower than

395 Judgment of 18 October 2017, *Kalliri*, C-409/16, ECLI:EU:C:2017:767.

396 **Irish** Equality Tribunal, *Smith* v *CIE* (EE/4/1979; DEE/1/1979).

397 **Greek** Questionnaire to this report: An original quota of 15 % to the detriment of women for enrolment to the police schools, provided by Article 1(2a) Act 2226/1994 (OJ A 122/21.7.1994), as amended by Article 12(1) Act 2713/1999 (OJ A 89/30.4.1999), was found to constitute direct gender discrimination by the CS judgment No. 1917/1998. This quota was abolished by Article 20(3) Act 3103/2003 (OJ A 23/29.01.2003), which provided common physical requirements and athletic and psychotechnical tests for both sexes. Presidential Decree 4/1995 originally provided a minimum height of 1.70 m for male candidates and 1.65m height for female candidates for the police schools. For reasons of conformity with the above provision of Article 20(3) Act 3103/2003, Article 2(1) Presidential Decree 4/1995 was amended by Article 1(1) of Presidential Decree 90/2003, providing a common height requirement of 1.70m for both sexes. Women's access to the Greek Fire Brigade was allowed for the first time by P.D. 5/1995 following a relevant remark of the Council of State in the exercise of its competence of elaboration of the presidential decrees (674/1994). Originally, the minimum height was set at 1.70m for male candidates and at 1.60m for female candidates, which was later raised to 1.65m by P.D. 397/1998 (OJ A 276/8.12.1998). The above minimum heights (1.70 male, 1.65 female) are still provided to date by the relevant Regulation at issue (P.D. 19/2006 OJ A 16/07.02.2006), which also provides common athletic requirements for both sexes (already found to be objectively justified as genuine occupational requirements by CS judgments No. 978-980/2016), written exams, interviews and psychotechnical tests. A quota of 10 % to the detriment of women introduced by Article 12(2) Act 2713/1999 (OJ A 89/30.4.1999) was subsequently abolished by Article 12(3) Act 3387/2005 (OJ A 224/12.9.2005) in the light of the relevant CS jurisprudence (CS 1917/1998 Full Section) concerning access of women to the Police Academy.

the average male height aged 18-24 years and 6-7cm higher than the average height of women in the same age group.[398]

However, a variable height requirement can be problematic too if it does not properly reflect the height differences between men and women. While the Greek courts seem more flexible in that regard,[399] one may question whether a height requirement of 1.70m for men and 1.65m for women is sufficiently reflective of height differences given that the average height of women is 1.63m while the average height of men is over 1.70m. For example, the equality body in **Cyprus** challenged gender-specific height criteria because they were not based on any scientific evidence/statistics concerning Cypriot women's median height.[400] The **Romanian** equality body has expressed similar concerns.[401] Even if the difference in height requirements reflects the average height of men and women, they may be problematic from an intersectional perspective. This was highlighted by the **Hungarian** ombudsman, as ethnic Roma people from socioeconomically disadvantaged communities may have heights below the national average due to environmental causes, such as poor nutrition.[402]

Given these difficulties with height requirements, one might wonder why they are legitimate at all. On the one hand, gendered height requirements can be viewed as ensuring real access to employment and equal opportunities as it imposes an equal burden on men and women regarding their height. Accordingly, men are not disadvantaged because they are required to be taller.[403] On the other hand, the changing nature of different height criteria throughout the years as well as different requirements within the police, fire brigade and military raises the question whether they genuinely reflect a concern and address it in a consistent and systematic manner. National courts nevertheless often adopt a rather lenient approach by simply invoking the efficiency of police forces and public safety without clarifying how the these relate to the height requirement.[404] For example, the Administrative Court of North Rhine-Westphalia in **Germany** went so far as to suggest that the use of different height requirements for men and women

398 **Greek** Council of State 2055/2019, available at: http://www.nbonline.gr/journals/51/volumes/ 1078/issues/1714/lemmas/4914529 (private database; no free access). See EELN flash report (Greece) of 23.03.2020 'Higher minimum height for male candidates to the Fire Brigade does not entail gender discrimination', available at: https://www.equalitylaw.eu/downloads/5102-greece-higher-minimum-height-for-male-candidates-101-kb; judgments No. 2056-2060/2019.

399 **Greek** Council of State 2353/2019, available at: https://lawdb.intrasoftnet.com (private data bank; no free access). See EELN flash report (Greece) 'Successive increase and decrease of minimum height requirement for female candidates to Port Police makes doubtful whether the set height of 1.65m is a genuine occupational requirement', available at: https://www.equalitylaw.eu/downloads/5103-greece-minimum-height-for-female-candidates-to-port-police-107-kb. Judgments No. 2056-2060/2019.

400 **Cyprus**, Equality body, decision of 19 March 2014 (complaint numbers A.K.I. 9/2014 and A.K.I 12/2014).

401 **Romania**, CNCD (2017), Decision Nos. 147 of 1 March 2017, 168 of 7 March 2017, 176 of 15 March 2017, 289 of 10 May 2017, 308 of 17 May 2017 and 633 of 8 November 2017.

402 **Hungary**, Parliamentary Commissioner for the Rights of National and Ethnic Minorities (2008) *Jelentés a Rendőrség roma kisebbségekkel kapcsolatos egyenlő bánásmódjának biztosítékrendszeréről és annak hiányosságairól* (Report on the guarantees and shortcomings of the equal treatment of Roma communities by the Police), No. 5224/2008, pp. 54-55, http://www.kisebbsegiombudsman.hu/data/files/197862598.pdf.

403 **Greek** Council of State 2099/2019 available at: http://www.nbonline.gr/journals/51/volumes/ 1078/issues/1714/lemmas/4914529 (private data bank; no free access); https://lawdb.intrasoftnet.com (private database; no free access). See EELN flash report (Greece) of 23.3.2020 'Follow-up to the CJEU *Kalliri* C-409/16 – Common minimum height requirement to the detriment of women for access to the Police Academy entails indirect gender discrimination', available at: https://www.equalitylaw.eu/downloads/5101-greece-follow-up-to-the-cjeu-kalliri-case-100-kb. Similarly, the **Polish** Supreme Administrative Court in judgment of 9 March 2011, I OSK 1536/10 (LEX No. 990180) found that the recognition of physical differences between the sexes in recruitment for uniformed services was not contrary to the concept of equality. It specifically held 'the diversity of the requirements for the physical fitness of candidates for professional soldiers by gender does not constitute a violation of constitutional principles but results from the well-known differences in motor skills of women and men (...). It is this diversity that gives women equal rights to apply for admission to professions previously performed by men, and it is this diversity that is a sign of constitutional equality and not a violation of it.'

404 See for example, **Germany**, Administrative Court of Düsseldorf, judgment of 2 October 2007, 2 K 2070/07; Administrative Court of Berlin, judgment of 1 June 2017, 5 K 219.16, and State Administrative Court of Berlin and Brandenburg, judgment of 27 January 2017, OVG 4 S 48.16, confirming a minimum body height of 160cm for female police officers in the state of Berlin. For a more detailed discussion recognising indirect sex discrimination see Administrative Court of Schleswig-Holstein, judgment of 26 March 2015, 12 A 120/14; State Labour Court of Cologne, judgment of 25 June 2014, 5 Sa 75/14.

would potentially question the principle of qualification, seemingly without further exploring how height relates to qualification.[405]

The link between aptitude and height is nevertheless unclear.[406] Certainly, physical or emotional fitness tests seem to be more appropriate aptitude tests than abstract height requirements.[407] While a common aptitude test for men and women may also create 'particular disadvantages' for women,[408] they seem more closely related to the specific abilities that are required. They are thus more likely to be essential for certain positions.[409] In that regard the **Polish** ombudsman noted:

> 'Justifying the apparent equalization of physical fitness criteria with the requirement of particular availability or specificity of service in the Police, PSP, BOR – in gremio also raises doubts from the point of view of art. 3 point 2 of the Act of 3 December 2010 on the implementation of certain European Union provisions in the field of equal treatment (...). According to its content, indirect discrimination is a situation in which for a natural person, among others due to sex, as a result of a seemingly neutral criterion, there are or could be adverse disproportions or a particularly unfavourable situation, unless the provision, criterion or action is objectively justified due to the legitimate aim to be achieved and the means to achieve for this purpose are appropriate and necessary. (...) This seemingly neutral criterion in the present case is the physical fitness of the candidates for police service. Because not all positions in the police require the same level of physical fitness of officers, the aim to ensure public security may not serve as justification for the introduction of the same physical fitness requirements for all candidates.'[410]

A general link between height and ability to discharge duties that require physical strength and fitness is hardly more than a 'mere generalisation' that is not sufficient to justify 'particular disadvantages.'[411] It also seems unnecessary. In that context, the European Commission noted (a) that a large number of European States that have abolished height requirements for access to the police force; (b) that there is an international tendency to substitute height requirements with body mass index, differentiated by gender; (c) that existing height requirements within the Member States are set in conformity with the average height of each sex; (d) that a common male and female height requirement is an exception among EU Member States, and usually set lower than the average height of the population; (e) in other European countries (except Greece), height requirements for female candidates, either common or differentiated by

405 State Administrative Court of North Rhine-Westphalia, judgment of 21 September 2017, 6 A 916/16; confirmed by State Administrative Court of North Rhine-Westphalia, judgment of 28 July 2018, 6 A 2016/17. The **German** Questionnaire to this report indicates that 'more than one administrative judge involved in lower-instance proceedings in North Rhine-Westphalia informed the media that 'the promotion of women is not above everything' and that highly qualified men were being discriminated against while less qualified women were given the jobs.'

406 See for discussion in the **Greek** Council of State (dissenting opinion) 2353/2019, with reference to CJEU judgment of 10 March 2009, *Hartlauer*, C-169/07, ECLI:EU:C:2009:141, para 55; judgment of 15 October 2015, *Grupo Itevelesa and Others*, C-168/14, ECLI:EU:C:2015:685, para 76; judgment of 14 March 2017, *Achbita* v *G4S Secure Solutions*, C-157/15, ECLI:EU:C:2017:203, para 40; judgment of 30 June 2016, *Sokoll-Seebacher and Others*, C-634/15, ECLI:EU:C:2017:203, para 27.

407 See also **Romanian** Equality Body, CNCD (2017), Decision No.147 of 1 March 2017, paras 5.16, 5.19 referring to the French Equality Body (5.25).

408 **Cyprus** Equality body, decision of 19 March 2014 (complaint numbers A.K.I. 9/2014 and A.K.I 12/2014); *Elena Aresti* v *General Attorney of the Republic*.

409 For example, the **Irish** court in *Gibney* v *Dublin Corporation* (EE/5/1986) considered physical strength an essential requirement for the position of firefighter. Prior to the *Kalliri* judgements, the **Greek** Council of State also specifically emphasised the need for women and men to have the same physical ability to discharge their duties.

410 Address of the **Polish** Ombudsman to the Minister of the Interior concerning complaints about discrimination against women in the recruitment process to the Police force, 4 August 2014, available at: https://www.rpo.gov.pl/sites/default/files/Do_MSW_ws_skarg%20_dotyczacych_%20dyskryminacji_%20kobiet_przy_naborze%20do_Policji.pdf.

411 As required by the CJEU case law: judgment of 9 February 1999, *Seymour-Smith and Perez*, C-167/97, ECLI:EU:C:1999:60; judgment of 11 September 2003, *Steinicke*, C-77/02, ECLI:EU:C:2003:458; judgment of 13 July 1989, *Rinner-Kühn* v *FWW Spezial-Gebäudereinigung*, C-171/88, ECLI:EU:C:1989:328; judgment of 7 February 1991, *Nimz* v *Freie und Hansestadt Hamburg*, C-184/89, ECLI:EU:C:1991:50; judgment of 17 June 1998, *Hill and Stapleton* v *Revenue Commissioners*, C-243/95, ECLI:EU:C:1998:298.

sex, range from 1.52 to 1.65m, and only in Greece is there a height requirement for female candidates that is set at 1.70m.[412]

The **Greek** Council of State has now reconsidered its previous rather relaxed attitude towards height requirements. Specifically, the court accurately considered the statistical data, took into account the discriminatory exclusion of women from the police and fire brigades and eventually applied **objective justification** strictly. This stands in stark contrast with its previous approach, which simply rejected the claim that common height or physical requirements constitute indirect sex discrimination with a generalised reference to public interest related to municipal police duties.[413] Within the post-*Kalliri* case law, the Council of State accepted that there was no link between the height and the particular physical aptitude of a candidate and considered that less strict measures, such as a physical ability test, could achieve the same aim.

Beyond specific strength and height requirements for specific professions, a focus on the physicality of certain types work and their accessibility for men and women can further expose the **gendered nature of physical requirements related to strength** that impedes women's access to certain professions, as well as devaluing women's work and ability. This has three dimensions. First, as recognised in *Rummler*, it is not obvious why physically demanding work is often considered of more value than other manual work that women typically fulfil more easily. There is a significant amount of older national case law that recognises and challenges such discrepancies.[414] However, it is often difficult to challenge the different evaluation within a segregated labour market, as the focus on the comparative disadvantage does not determine a specific appropriate treatment with reference to trends within society as a whole. Secondly, within the segregated labour market, physical demands of work commonly occupied by women are often ignored, while they are recognised in occupations typically occupied by men. This stark contrast becomes obvious if we compare the construction sector and the care sector.[415] As such, it is simply untrue that work typically occupied by women is 'light work', as illustrated by care work that is disproportional female. For example, the **Icelandic** expert notes that women often carry out more physically demanding work that has detrimental effects on their health in older age, as demonstrated by the higher rate of older women who are disabled. Thirdly, it is often difficult for women to access work that is perceived as physically demanding. Notably, this is often not due to lack of qualification or physical ability. Rather, it has been shown that women and men with identical résumés and equivalent job qualifications face very different hurdles accessing male-dominated (manual) professions that are perceived as physically strenuous, such as car mechanics, gardeners, or delivery jobs. A **French** study suggested that women had 22-35 % less chance of being recruited for jobs based on a selection process evaluating strength and perceived stamina.[416]

412 Remarks of the European Commission to the CJEU in the judgment of 18 October 2017, *Kalliri*, C-409/16, ECLI:EU:C:2017:767 concerning the international requirements of the physical aptitude of the police force; **Greek** Questionnaire to this report.

413 **Greek** Council of State judgment No. 826/2016.

414 For example, the **French** Court of Cassation, No. 95-41694 95-41695, Soc. 12 February 1997 was concerned with different pay for workers delicately sorting mushrooms, who were mostly women, and workers carrying the crates of mushrooms, who were mostly male. Physical strength was the justification for the difference in pay and was rejected as such. In judgment 145/1991, of 1 July 1991, ECLI:ES:TC:1991:145, the **Spanish** Constitutional Court considered certain professional classifications to constitute indirect sex discrimination because, although the collective agreement had valued the physical effort required in the category occupied mostly by men, it did not value other factors, which were required in the category occupied mostly by women in the same way. See also judgment 58/1994, 28 February 1994. The **Icelandic** Equality Complaints Committee in 1998 (Gender Equality Complaints Committee, Case No. 9/1997 from 19 June 1998) considered a difference in pay that distinguished between the operation of bigger machines and the operation of smaller machines. While the Committee concluded that the difference in wages was justified it considered that it required more transparency.

415 For example, **German** Questionnaire to this report.

416 Mailfert, A-C. (2018) 'Do you have to change sexes to be a mechanic?' Report by the Foundation for Women with a testing by the Observatory on discrimination of the Sorbonne University, summary available at: https://fondationdesfemmes.org/wp-content/uploads/2018/11/CP-Testing-DIALEM-3.pdf.

4.7 Conclusions

This chapter has covered the primary features of the concept of indirect sex discrimination law as developed by the CJEU and as applied by the Member States. Specifically, indirect discrimination includes two stages: the identification of a 'particular disadvantage' for one sex to establish a *prima facie* case of indirect discrimination and the absence of any objective justification that – following the causation approach – can rebut that primary assumption or – following the justification approach – can justify the discriminatory treatment in exceptional circumstances. Both stages have been considered in a large number of cases that have developed the concept, defined their limits and demonstrate their concepts. Indirect sex discrimination law can thus look back on a rich history and is by no means in its infancy. While national courts are left with some discretion regarding objective justification, the CJEU guidelines regarding the identification of a prima facie case of indirect sex discrimination have been relatively instructive. Nevertheless, the concept remains poorly understood in many Member States and is surprisingly rarely applied given that the socioeconomic environments of all Member States suffer from systemic and structural gender inequality, although the degree varies.

Several aspects of the concept of indirect sex discrimination make its application difficult outside the use of commonly recognised gendered criteria such as part-time work and parental leave. The correct pool of comparators is not always easy to identify within complex employment structures and often creates an impossible hurdle for individual claimants within the individual rights-based approach. The focus on statistical evidence, while potentially able to uncover unequal effects that are hidden behind apparently neutral measures, criteria or practices, reaches its limit if statistically significant data is not available, something that is very likely to happen if collective approaches to the identification of unequal outcomes are dismissed in favour of an individualistic approach, which can reduce the pool of comparators significantly. While qualitative reasonings are possible in principle, courts have little experience with such methods. The single source requirement also excludes many systemic inequalities in the segregated labour market from the scope of inquiry. As such, although indirect sex discrimination is able to address structural and systemic disadvantages, it is limited by its focus on individual rights, which pits one employee or group of employees against one employer. As systemic disadvantages are often the result of interacting disadvantages, circumstances and the broader socioeconomic environment meaning that there is no single source that can be blamed, an overly individualistic approach that neglects the collective dimension will be unable to address deeply rooted gender inequality.

Moreover, while the CJEU has provided guidance on the first stage of the test of indirect sex discrimination, its discussion on the objective justification has been more limited. As such, Member States have significant discretion within the area. While this is not necessarily problematic in principle, given that the precise objective justification will depend on the individual circumstances of the case, there is some evidence that national courts do no recognise the strictness of the test and all too quickly accept the justifications given. While this may stem from a general reluctance to interfere with internal work processes, the CJEU's clear statements regarding the strictness of the test in *Brachner* and *Leone* should leave little doubt that national courts are required to apply a strict test of objective justification that may go beyond national understandings of reasonability or the proportionality test. In that regard, there also needs to be a deeper appreciation of the two-stage test of indirect sex discrimination, as an objective justification can only be properly considered once the prima facie case of indirect sex discrimination law and the de facto consequences of the measure have been explored fully. Some national courts are all too willing to consider possible objective justifications without considering the first important step.

The following section will discuss aspects of the concept of indirect sex discrimination that are underdeveloped within the current understanding of EU indirect discrimination law in more detail, taking into account the Member States' experiences of engaging with the principle, as well as the concept's unexplored potential.

5 Current limitations and uncertainties within the EU legal framework

Despite the concept of indirect sex discrimination already being recognised in the 1980s[417] and despite the concept as developed by the CJEU and EU legislation seemingly being clearly defined (at least prima facie), some uncertainties remain. The following section will focus on the scope of qualitative reasoning in establishing a 'particular disadvantage', the personal requirements of a claimant, the use of gender rather than sex to identify groups that suffer a 'particular disadvantage', intersectional claims within the scope of indirect sex discrimination and the scope of reasonable accommodation within the concept of indirect sex discrimination law. All of these aspects are somewhat underdeveloped or have been neglected by the CJEU and EU legislature. However, a robust understanding of how these aspects can be addressed under the scope of indirect sex discrimination law remains important if it is to grapple with the de facto structural inequalities that create specific vulnerabilities for some groups within society and that neglect differences. The discussion identifies the current practical limits of the concept and how they can be overcome to address systemic gender inequality more effectively. The potential significance of the concept within the current employment market, including new forms of work, will then be considered in section 6.

5.1 The scope of qualitative reasoning to establish a 'particular disadvantage'

A 'particular disadvantage' within indirect sex discrimination law can be demonstrated statistically as well as by reference to qualitative reasoning. The latter refers to a substantive argument that explains why a measure carries a particular disadvantage without statistical demonstration of that disadvantage. For example, flexibility requirements can be prima facie discriminatory, because workers with care responsibilities (and thus predominantly women) will struggle to comply with them. In many cases, statistical and qualitative reasoning can overlap and come to the same conclusion. At times, qualitative reasoning may be invoked because statistical evidence is not available. However, there is some uncertainty regarding the use of qualitative assessments that is entirely separate from statistical evidence. We will consider each situation in turn.

Measures disadvantaging part-time workers, workers on parental leave, or workers with care responsibilities, were all deemed potentially discriminatory because women are more likely to work part time, go on parental leave, or have care responsibilities that potentially make them less flexible regarding working time/hours, and less mobile. The group disadvantage can usually be demonstrated statistically, at least as long as statistical data is available. However, while nationwide gendered difference regarding part-time work and parental leave are often not disputed, the situation within a specific undertaking may be different. Depending on the frame of reference, we are thus able to identify a prima facie case of indirect sex discrimination or not. At this stage one may already wonder whether statistical evidence alone is sufficient.

Nevertheless, statistical evidence remains important in the context of indirect sex discrimination and the recording and accessing of statistical data in sex discrimination does not create the practical or legal difficulties found in relation to the other protected grounds. In fact, it is expected that 'comparable statistics disaggregated by sex should continue to be developed, analysed and made available' for the better understanding of the different treatment of men and women.[418] The use of statistical evidence has also the benefit of letting the facts speak for themselves. In principle, they do not require any further explanation of the disadvantaging effect, identification of a common trait or ability within

417 Judgment of 31 March 1981, *Jenkins,* C-96/80, ECLI:EU:C:1981:80; judgment of 13 May 1986, *Bilka* v *Weber von Hartz,* C-170/84, ECLI:EU:C:1986:204.

418 Recital 37 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, pp. 23–36.

the disadvantaged group that causes the disadvantaging effect, or any reference to past or current (structural) disadvantages.[419] In line with this, the **UK** Supreme Court rejected any need for a reason *why* the disadvantage occurred and only focused on the statistically demonstrated link between the apparently neutral measure and the disadvantage.[420] This approach can reveal disadvantages that are not directly obvious to the untrained eye and test the true neutral nature of measures, practices and criteria that have popped up in recent years to assess workers fairly. For example, criteria such as merit or experience can carry particular disadvantages as they rely on male standards when being defined. Moreover, a statistical focus on disproportional burdens can be especially helpful in the context of intersectional disadvantages that specifically burden some women.[421] While the CJEU has not yet adopted a robust approach towards intersectionality,[422] the focus on statistics can reveal these disadvantages and their relevance in the context of indirect sex discrimination.[423]

Qualitative assessments then only become relevant once statistical evidence is not available or unsatisfactory. Employment policies and practices may disproportionally prevent workers with one sex or a subgroup within that sex group from accessing certain work and employment conditions. It would then not be satisfactory to dismiss a disproportional disadvantage simply because of an absence of numbers that are statistically significant.

A joint qualitative and statistical reasoning can help to identify subtle discriminatory effects that disadvantage women throughout their career. For example, a statistical and qualitative assessment may recognise that seniority can be a problematic criterion because women more often take career breaks. However, neither is likely to identify the criterion's potential ability to cement women's disadvantages, as a focus on the criteria alone hides processes that may undermine the proper recognition of women's seniority under cover of neutrality.[424] A more detailed engagement with the criteria and their effects could then question their neutrality in general, irrespective of a specific statistically demonstrable disadvantage it creates within the undertaking. The difference matters, as it influences the overall assessment of the case, especially regarding the objective justification. It is certainly easier to justify a seniority criterion if it is viewed simply as rewarding work experience than if its neutrality itself is questioned. For example, in *Nimz*, the way seniority was taken into account in the reclassification of a higher salary grade depended on working time, with those being employed for at least three-quarters of the normal working time benefiting from the inclusion of their entire probation period, while for other workers, only half of the probation period was taken into account.[425] It was thus questioned whether there is a difference between full-time and part-time length of service. However, in *Cadman* the use of length of service to determine pay was challenged more generally.[426] While both cases referred to the existing statistical evidence to support their claim of indirect sex discrimination, they could also have been assessed under the scope of a qualitative assessment. Specifically, it could have been considered how seniority as an indicator of quality of service projects a certain idea of an 'ideal normal employee' that predominantly reflects male norms and standards but does not take all relevant experiences into account. To employ the criterion anyway, would then require an objective justification, as general assumptions about the connection between length of service and value of service have already been dismantled.[427]

419 This has been subject of recent discussion within the UK context, see Fredman, S. (2018) 'Reviving Indirect Discrimination: *Essop* v *Home Office*' in Clarry, D. (ed.), *The UK Supreme Court Yearbook Vol 8 2016-2017 Legal Year* (Appellate Press,) pp. 154-175.
420 **UK** Supreme Court, *Essop and others* v *Home Office (UK Border Agency)*; *Naeem* v *Secretary of State for Justice* [2017] UKSC 27.
421 Schiek, D. (2016) 'Intersectionality and the Notion of Disability in EU Discrimination law' 53(1) *Common Market Law Review* 35.
422 Judgment of 24 November 2016, *Parris*, C-443/15, ECLI:EU:C:2016:89; Schiek, D. (2018) 'On uses, mis-uses and non-uses of intersectionality before the Court of Justice (EU)' 18(2/3) *International Journal of Discrimination and the Law* 82.
423 See the discussion in section 5.4 below.
424 Schiek, D. (2007) 'Indirect Discrimination' in Schiek, D., Waddington, L. and Bell, M. (eds) *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Ius Commune Casebooks for the Common Law of Europe (Hart Publishing) pp. 323, 426.
425 Judgment of 7 February 1991, *Nimz* v *Freie und Hansestadt Hamburg*, C-184/89, ECLI:EU:C:1991:50.
426 Judgment of 3 October 2006, *Cadman*, C-17/05, ECLI:EU:C:2006:633.
427 See also section 4.4.4 above.

Gendered disadvantages linked to parental leave or part-time work can be demonstrated statistically, but if we consider gender roles and systemic gender inequality that persist within European societies, a qualitative assessment could come to the same result. Traditional gender roles and structural gender inequality, including the gender pay gap, impose double burdens on women, which in turn encourages them to take up part-time work, parental leave and accept most care responsibilities. While men also work part time, they often do so for different reasons and at different moments in their career. Thus, men may work part time because of a lack of available full-time work, wanting to work less, to combine work and study or because of part-time retirement.[428] Even in countries where the numbers of male and female part-time workers show little divergence, structural gender inequality can be relevant. For example, the **Latvian** expert reports that women are much more likely to take up part-time work due to family reasons than men, even though there is no significant discrepancy between the number of male and female part-time workers overall. There is thus a gendered dimension to part-time work, even if there is an additional range of diverse reasons for men and women alike to enter part-time work. For indirect sex discrimination law to recognise these reasons, it needs to dissect the qualitative findings from the numbers. While the CJEU does not require detailed statistical evidence regarding the situation in a specific sector or business that is not available to the claimant if the general imbalance between male and female part-time workers is not disputed,[429] it left it open to the defendant to demonstrate the contrary.

To what degree a qualitative reasoning could be invoked if the general statistical evidence does not support a prima facie claim of indirect sex discrimination remains doubtful. On the one hand, it could be suggested that the statistical evidence should prevail, given that it can dismantle certain gender stereotypes that do not reflect current social structures. If it is no longer true that women are more likely to work part time or take parental leave than men, there is no reason to protect them under the scope of indirect sex discrimination. If people in that situation nevertheless deserve protection from discrimination, it would have to be based on their specific situation.

On the other hand, a link to gender equality could still be recognised if qualitative reasoning considers why certain measures may impute a group disadvantage despite statistical evidence suggesting a balanced burden. For that, the reason why women are likely to end up in disadvantaged positions such as part-time work, seems to be relevant. If women are more likely to 'choose' the path because of family reasons, we may consider this to come under the scope of indirect sex discrimination, because the fact that more women than men do so suggests that there is limited freedom in that choice. Various social and economic factors can influence that choice, including social pressures and cultural expectations regarding the respective caring roles of men and women, financial pressures due to the gender pay gap and pressures from employers to reduce working time.[430] In that way, male and female part-time workers are in a very different situation because they reach the decision to reduce working time in very different contexts and thus may not be equally disadvantaged. However, there needs to be a limit to such an approach, if it does not want to privilege and protect certain choices that are better addressed by providing specific rights such as maternity and parental leave. Indirect sex discrimination can thus not replace substantive protection for workers on parental or other types of care leave. Rather, substantive rights and protection from discrimination are complementary. After all, structural gender inequalities may encourage women to take up part-time work because of family reasons, but that does not mean that other part-time workers' 'choice' to work part time is free from discriminatory circumstances. Impeded access to full-time work can be the result of discrimination and structural disadvantages too, even if they are not directly related to sex but rather to other protected characteristics. The Part-time Work Directive 97/81/EC[431] can address some of these issues but is limited in scope and has no clear link to care roles or gender inequality.

428 E.g. such comments were made in the **Estonian** Questionnaire to this report; Statistics Estonia (2020), 'Working part-time continues to be popular', News Release No. 18, 14 February 2020, https://www.stat.ee/en/uudised/news-release-2020-018.

429 Judgment of 3 October 2019, *Schuch-Ghannadan*, C-274/18, ECLI:EU:C:2019:828.

430 See, for example, Statistics Netherlands (CBS) (2018) *Emancipatiemonitor 2018* (Emancipation monitor).

431 Council Directive 97/81/EC of 15 December 1997 concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC, OJ L 14, 20.1.1998, pp. 9-14.

Moreover, there is a danger that a qualitative assessment reinforces gender stereotypes, as it protects women if they act according to traditional gender role expectations. Thus, they are protected if they indeed do take up most of the care and domestic responsibilities that potentially disadvantage them in the labour market. This in itself is not problematic because, although this reflects traditional gender roles and expectations, it also reflects statistical reality. From that perspective, gender stereotypes can describe statistical realities and reveal structural gender inequalities. Indirect sex discrimination thus needs to protect women within these roles. However, gender stereotypes can also be prescriptive, in the way that they force women and men into specific roles.[432] Indirect sex discrimination law potentially fosters such pressures if it withdraws its protection the moment women do not comply with these gender expectations. If women defy gender expectations and for example continue to work full time, share care responsibilities equally with their partner or enter typical male professions, the current limited understanding of the qualitative assessment provides less help, as they may not fall within the disadvantaged group. However, this does not mean that they do not experience more subtle forms of indirect sex discrimination linked to gender expectations or stereotypes. For example, the assumed 'male standard' of a well-supported full-time worker may disregard the legitimate interests of (male and female) workers with care responsibilities whether they work full or part-time, because it does not consider their needs. While different treatment that is blatantly based on gender stereotypes can be addressed within the scope of direct sex discrimination, other forms may be difficult to detect at all. Although statistical evidence can help in that context, its availability and significance is highly dependent on the specific circumstances of the case. The question is thus whether a qualitative assessment can be expanded without being based on unfounded stereotypes.

Within the national context, the use of qualitative assessment to trump statistical evidence has been a contentious issue. For example, the question whether 'well-known facts' can trump statistical evidence has been rejected in the **Netherlands** as it would reinforce unfounded stereotypes.[433] However, this is only convincing if the statistical evidence is indeed significant and determinative. Other than that, Dutch case law does explore 'facts of general knowledge', for example in relation to part-time work and care responsibilities.[434]

Qualitative assessments may also downplay the structural gender inequality that makes women the typical primary carer for children. For example, in the **UK** case *Hacking & Paterson v Wilson*, the Employment Appeal Tribunal (EAT) held that

> 'society has … changed quite dramatically … Many women return to full time employment after childbirth. The childcare arrangements available to some women are such that they cannot work full time. The position of some women is, though, that whilst they are able to access child care arrangements which would enable them to work full time they do not want to do so; for them, part time working is a matter of choice rather than necessity.'[435]

There seems to be little awareness that these choices are also made within a certain context and that the cultural change certainly has not reached all, if even the majority, of women. It also continues to privatise care work without recognising its contribution to public welfare, economic prosperity and social wellbeing. Such reasoning is thus intuitive, rather than analytical.

Accordingly, it is not surprising that the limited case law that exists within the Member States on qualitative reasonings still evokes statistics in more general terms similar to the approach outlined

432 Timmer, A. (2016) 'Gender Stereotypes in the Case Law of the EU Court of Justice' 1 *European Equality Law Review* 37; Timmer, A. (2011) 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights' 11(2) *Human Rights Law Review* 707; Timmer, A. (2015) 'Judging Stereotypes' 63(1) *American Journal of Comparative Law* 239; Peroni, L. and Timmer, A. (2016) 'Gender Stereotyping in Domestic Violence Cases' in Brems, E., and Timmer, A. (eds.) *Stereotypes and Human Rights Law* (Cambridge Intersentia) pp. 39, 41. See also the discussion in section 2 above.

433 Prof Dr Elffers, H., in Hof the Hague NL:GHDHA:2015:1284 (09.06.2015) PJ 2015, 143, para 4.5. and NL:GHDHA:2015:1285 (09.06.2015) PJ 2015, 113, para 4.5.

434 Mulder, J. (2017) *EU Non-Discrimination Law in the Courts* (Hart Publishing) pp. 224-225.

435 **United Kingdom**, Employment Appeal Tribunal, UKEATS/0054/09/BI, 27 May 2009.

above. For example, in the **UK**, qualitative reasoning may be invoked if the specific statistical evidence is difficult to access or may not be significant. In *Edwards*,[436] a flexibility requirement was identified as disadvantaging woman but thought to have broader implications for single mothers. The fact that there were very few women and only one single mother employed was then taken as further evidence of the exclusionary effect of the measure. Similarly, the **Irish** Labour Court in *Inoue* v *NBK Designs Ltd*[437] accepted that a requirement to work full time disadvantages single mothers in comparison to men and women without children. It thus required an objective justification. While Irish law also protects workers from disadvantages due to family status, the gender dimension was clear, given that more women than men are single parents. A **Danish** decision concerned with the dismissal of a single mother that was based on her perceived inflexibility also simply assumes a link between the discrimination of single parents and sex discrimination, without further elaboration of the link.[438]

The scope for qualitative reasoning therefore seems to be limited to specific circumstances that require a detailed assessment of the measure in question to identify its de facto impact on different groups within society, while still assessing the gender disparity within these groups in more general terms. For example, the CJEU assessment in *Danfoss*, explaining why women are disadvantaged by certain measures with reference to typical female burdens and career paths, including childcare and household duties, which affect mobility, lack of training opportunities and career breaks,[439] only makes sense if there is some demonstration that women are indeed more likely to face these burdens than men. Disadvantage in relation to absences due to pregnancy and parental leave (often considered together in the national context) are also often considered indirectly discriminatory without the need for statistical data. Beyond that, neither the CJEU nor the national courts have explored the potential application of qualitative assessments.

5.2 Who can be a claimant?

Indirect discrimination focuses on measures that disadvantage groups with a protected characteristic. Within indirect sex discrimination, the disadvantaged group is usually predominantly female but given its symmetric nature, there may also be cases of indirect sex discrimination suffered by men.[440] Since the concept of indirect sex discrimination law only requires a 'particular disadvantage', men fall under its scope of protection if they indeed suffer a disadvantage that can be demonstrated by reference to statistical evidence or qualitative assessment. Beyond those straightforward cases, it is not obvious to what extent men can benefit from protection under the scope of indirect sex discrimination. For that, we need to consider the link between indirect sex discrimination and gender, rather than sex.

As discussed above, in many cases we can clearly identify a link between the criterion used by the disadvantaging measure and the protected sex, because the structural gender inequality can be observed easily with reference to qualitative assessments (e.g. gender roles) and statistical evidence (descriptive reality). However, the link to sex – within its biological meaning – is a lot less obvious, given that there is no biological reason for these statistical realities. Men as well as women can thus be disadvantaged, even if only one sex group suffers a group disadvantage. The question is then whether the disadvantaged individual can still make a claim of indirect sex discrimination, even if they are not part of the disadvantaged group. For example, while there is a statistical correlation between the female sex and childcare-related part-time work, fathers take up childcare responsibilities, may take parental leave of significant length and enter part-time contracts to care for their children. While fathers' involvement with

436 **United Kingdom**, Employment Appeal Tribunal, *London Underground Ltd* v *Edwards* (No. 2) [1995] IRLR 355 and United Kingdom, England and Wales Court of Appeal, *London Underground Ltd* v *Edwards* (No. 2) [1998] IRLR 364, [1999] ICR 494.

437 **Irish** Labour Court, *Inoue v NBK Designs Ltd*., https://www.workplacerelations.ie/en/cases/2002/november/eed0212.html [2003] ELR 98.

438 **Denmark**, Eastern High Court, BS-17466/2019-OLR, Judgment of 7 September 2020.

439 Judgment of 17 October 1989, *Handels- og Kontorfunktionærernes Forbund i Danmark* v *Dansk Arbejdsgiverforening* for *Danfoss*, C-109/88, ECLI:EU:C:1989:383.

440 Judgment of 17 July 2014, *Leone*, C-173/13, ECLI:EU:C:2014:2090.

childcare and family responsibilities should be seen as one of the key policies to reduce structural gender inequality and gender stereotypes,[441] it is still unclear if and to what extent these fathers are protected under the scope of indirect sex discrimination law. On the one hand, this highlights the importance of sex-neutral rights relating to care and parental responsibility, on the other hand it requires the development of a robust understanding of the personal scope of indirect sex discrimination law that at times requires a focus on gender rather than sex. For example, a male part-time worker may struggle to claim indirect sex discrimination; he is part of the disadvantaged group of part-time workers, but he is not part of the disadvantaged sex group that suffers the disproportional disadvantage. While the potential effect of this is reduced by the explicit protection of part-time workers,[442] there are many other instances that potentially leave men less protected than women when taking up gendered responsibilities that are 'typically' carried out by women. Specifically, the male standard does not take into account the care responsibilities of male and female employees working full or part-time.

Some Member States have chosen to somewhat circumvent the issue by expanding the number of protected characteristics. For example, **Ireland** includes family responsibilities under the scope of family status, **French** law includes 'family situation' as a protected ground,[443] **Hungary** protects motherhood (pregnancy) and fatherhood explicitly, **Norway** prohibits discrimination based on care responsibilities, **Portugal** covers family condition and marital status, and **Sweden**'s Parental Leave Act also prohibits discrimination. **Greek** law clarifies that 'less favourable treatment of parents due to parental leave, adoption or fostering of a child also constitutes discrimination.'[444] Along those lines, Article 11 of the Work-life Balance Directive 2010/18/EU requires Member States to protect those who apply, take or have taken leave provided for in the directive from discrimination. Other Member States have a non-exhaustive list of protected characteristics that have enabled courts to identify parenthood-based discrimination directly.[445] These additional protected grounds – just like the protection of part-time workers within the EU legal framework – circumvent some problems linked to establishing a prima facie case of indirect sex discrimination but fail to provide a catch-all mechanism in the way that indirect sex discrimination can. Specifically, this approach only addresses disadvantages that are clearly gendered and where structural inequality and the effects on the competitiveness within the labour market have already been demonstrated and deemed problematic.

Alternatively, one may suggest that there should be a focus on gender roles rather than sex, including the issue of male standards and gendered power relations. Accordingly, men who suffer disadvantages at the workplace because of personal circumstances that are usually associated with the female sex, such as childcare, family or other typically gendered responsibilities, are protected to the same extent as women would be, because, although male, they are taking up a gender role that is generally perceived as female and carries specific gendered disadvantages, so they are thus disadvantaged alongside the disadvantaged group of women. One may consider this a type of discrimination by association, as it links the discrimination with a type of gender role or behaviour that is associated with the female sex. While discrimination by association was predominantly discussed regarding direct disability discrimination in *Coleman*, the case also touched upon the care dimension more generally, as it was the fact that Ms Coleman was the carer of her disabled child that, among other things, led to the disadvantage.[446] It has been suggested that indirect discrimination can recognise similar discrimination by association.[447] If such

441 Directive 2019/1158/EU of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, OJ L 188, 12.7.2019, pp. 79-93.
442 Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, OJ L 14, 20.1.1998, pp. 9-14.
443 The ground is mentioned in the **French** Labour code, Article L 1132-1 https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000028650462&cidTexte=LEGITEXT000006072050.
444 **Greece**, Act 3896/2010, Article 18.
445 For example, in the ruling of 25 February 2016 (case no II PK 357/14) the **Polish** Supreme Court noted: '…if taking up childcare leave by the employee, upon his return to work becomes the reason for unequal treatment in employment, it constitutes parenthood related discrimination.' **Slovenia** could also subsume parenthood discrimination under 'other personal circumstances.'
446 Judgment of 17 July 2008, *Coleman*, C-303/06, ECLI:EU:C:2008:415.
447 This is indeed a common interpretation of *CHEZ* further discussed below.

association includes not simply associations with the disadvantaged sex but also gender roles, it could protect men and women who act outside the scope of gender expectations generally associated with their sex and thus tackle systematic and structural disadvantages more effectively.

Few national cases have explored the potential of discrimination by association within the context of sex. **French** law recognises the possibility of suffering alongside the disadvantaged group within the context of discrimination by association in combination with the protected ground of 'family situation' in that it covers family members of the person who forms part of the protected group and suffer the same discrimination.[448] However, this would seem to require that the family member is indeed part of a protected group and suffers a disadvantage. A **Swedish** case involves a male claimant whose probationary employment was interrupted because it was not possible to conduct a performance review due to the employee's parental leave. The parental leave was entered into on short notice, once it transpired that the mother would be unable to take care of the child due to a severe birth-related illness. The claim is based on both the prohibition against detrimental treatment in the Parental Leave Act and on indirect sex discrimination on the ground of the female sex. The latter is a claim of discrimination by association, as the claimant claims to be discriminated against in his capacity as a relative of the mother of the child. Alternatively, one may view this as a case of discrimination based on gender stereotypes, because the man suffers a disadvantage because he does not comply with 'typical male behaviour'. Accordingly, the claim would be better placed within the scope of direct sex discrimination. Certainly, once 'apparently neutral provisions' are challenged because of the 'particular disadvantage' they create for women, the measure, criterion or practice has to be amended to ensure discriminatory-free treatment.[449] This will benefit men who are in a similar situation as the disadvantaged group, too, since there cannot be any direct distinction between men and women regarding their employment conditions.

Finally, one may consider the de facto (or perceived) identity of the disadvantaged person. This seemed to have been the suggestion by the **Bulgarian** Administrative Court in Sofia, which sent a preliminary reference request to the CJEU in *CHEZ*.[450] Although the claimant was not of Roma origin, the court considered that, 'by identifying herself with the population of Roma origin of the district, Ms Nikolova defined herself as a person of Roma origin and so the Commission for Protection against Discrimination (KZD) was incorrect to hold her ethnic origin had not been established. Although inclined to consider that the practice of installing electricity meters at height was direct discrimination, the Court was unsure if the practice amounted to either direct or indirect discrimination. Finally, if the practice did amount to discrimination, the Court took the view that it would not be justified. It submitted 10 questions in relation to these points to the CJEU for its consideration.'[451] Obviously, the CJEU took a somewhat different approach, which has been considered as discrimination by association.[452]

Finnish law provides a creative solution, which on the one hand keeps the dynamic nature of indirect sex discrimination intact, while on the other hand making sure that certain gendered behaviour is covered irrespective of the sex of the claimant. It does so by specifically defining differential treatment on the basis of parenthood and childcare duties as indirect sex discrimination. While this does not cover fathers' right

448 Discrimination against one employee because he is married to another employee, Court of Cassation No. 96-43617, 1 June 1999.

449 Judgment of 8 April 1976, *Gabrielle Defrenne* v *Société Anonyme Belge de Navigation Aérienne Sabena* (*Defrenne II*) C-43/75, ECLI:EU:C:1976:56; judgment of 7 February 1991, *Nimz* v *Freie und Hansestadt Hamburg*, C-184/89, ECLI:EU:C:1991:50; judgment of 20 March 2003, *Kutz-Bauer*, C-187/00, ECLI:EU:C:2003:168.

450 See discussion of the CJEU case below.

451 **Bulgarian** Questionnaire to this report; Request for a preliminary ruling from the Administrativen sad Sofia-grad (Bulgaria) lodged on 17 February 2014 — *CHEZ Razpredelenie Bulgaria AD* v *Komisa za zashtita ot diskiminatsia*.

452 Judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, ECLI:EU:C:2015:480. Further discussed below.

to leave,[453] it broadens the scope for fathers, as the disadvantage does not have to be 'particular' in that situation. Access to leave can then potentially be addressed under the scope of direct sex discrimination as the CJEU and EU legislation requires that fathers and mothers have equal access to all forms of parental leave and only reserves maternity leave to the mother who has given birth.[454]

5.3 Gender as an alternative focus within indirect sex discrimination?

The discussion above highlights the danger of an over-reliance on sex alone to determine a 'particular disadvantage', as this ignores the structural reasons for the disadvantage, which can include some men. Thus, it emphasises the need to consider the structural reasons men and women arrange their lives differently, and the different social contexts and power relations that persuade them to do so. However, having too close a focus on the reasons why a disadvantage occurs is also problematic within indirect sex discrimination, as it hinders the concept's potential to uncover hidden disadvantages that lack an immediate explanation.[455] Specifically, the objective assessment of a disadvantage discovered by statistics should be sufficient for a prima facie case of indirect sex discrimination. If we consider the reason why somebody has ended up in the disadvantaged group to be relevant and exclude those people who cannot demonstrate a link to gender roles from the protection, we differentiate between those deserving and those non-deserving of protection. For example, workers may choose to work part time for different reasons that are related or unrelated to gender inequality (e.g. care responsibility, health, or because of a desire for additional leisure time). However, the reason why is irrelevant to establish a prima facie case of indirect sex discrimination as long as the gendered 'particular disadvantage' is demonstrated statistically. This was at issue in a recent **UK** case on indirect race discrimination. Here, the UK Supreme Court held that indirect discrimination only requires a causal link between the challenged measure and the disadvantage. It is thus not necessary to further explore why the disadvantage occurred.[456] To retain the potential of statistical evidence to establish a prima facie case of indirect discrimination, we should thus refrain from any 'reason why' analysis to establish a 'particular disadvantage'.

A specific scope of gender may then only be able to address issues that are obviously gendered, such as part-time work, and include men if in the same situation. That focus will not address all gendered disadvantages that have a very different effect on men or women, even when they take similar leaves due to childcare. Some studies indicate that men are much more likely to use the extra parental leave-related free time for personal development or quality time with their children, rather than the long-term everyday care, which is left to the mother.[457] While such leave is still recognised under the parental leave provisions, it may be questionable if they carry the same disadvantages, at least if we do not only consider the time taken, but the exhaustion that comes with long-term everyday care and may hinder career progression.

In *CHEZ*, which concerned indirect race discrimination, the CJEU suggested that discrimination should be assessed on an objective basis, irrespective of the individual claimant. The fact that the claimant did not belong to one of the protected groups disproportionally affected by the disadvantage in question

453 See **Finnish** Report: 'It should be noted that prohibition of differential treatment on the basis of parenthood and childcare does not give a justiciable right for parents. Section 8 of the Equality Act on discrimination in working life gives a right to compensation to a person who has been discriminated against, but the section covers only issues that the employer has control over. The system of family-related leave is not among them. Thus, the separate prohibition of differential treatment on the basis of parenthood and childcare does not cover a father's right to leave, which was the issue in Case C-104/09 Alvarez. Fathers have a right to paternity and parental leave, but the right to parental leave is used less by fathers than mothers. One of the reasons behind the disparity is prohibitive attitudes of the employers to fathers using their social parenting rights. Section 7(3) of the Equality Act is useful in these situations.'

454 Judgment of 19 September 2013, *Betriu Montull*, C-5/12, ELCI:EU:C:2013:571; judgment of 30 September 2010, *Roca Álvarez*, C-104/09, ECLI:EU:C:2010:561; judgment of 16 July 2015, *Maïstrellis*, C-222/14, ECLI:EU:C:2015:47; Burri, S. (2015) 'Parents who want to reconcile work and care: which equality under EU law?' van den Brink, M., Burri, S., Goldschmidt, J. (eds.), *Equality and human rights: nothing but trouble?* Liber amicorum Titia Loenen, SIM special, pp. 261 – 277. See further discussion below.

455 Mulder, J., 'Group disadvantages and vulnerabilities within EU consumer law: Two sides of the same coin?' (forthcoming).

456 **UK** Supreme Court *Essop and others* v *Home Office (UK Border Agency)*; *Naeem* v *Secretary of State for Justice* [2017] UKSC 27.

457 Brandth, B. and Kvande, E. (2016) 'Fathers and flexible parental leave' 30(2) *Work, Employment and Society* 275.

was thus irrelevant, although she did live in the same neighbourhood and was thus associated with the disadvantaged group.[458] This underlines the fundamental nature of the concept of non-discrimination.[459] Transferring this reasoning to sex discrimination, one may suggest that a measure that is deemed indirectly discriminatory because of its disproportionate effect on women and lack of objective justification is deemed discriminatory irrespective of the sex of the claimant involved. Male part-time workers could thus claim indirect sex discrimination irrespective of the reason for their part-time work, as long as the measure disproportionally disadvantages one sex, and women would be protected in the same circumstances. Otherwise, men and women would be treated differently despite being in the same situation.[460] In that regard, it should be pointed out that the CJEU generally assesses the comparability of situations in light of the subject matter, the benefit and the purpose of the law or measure that makes the distinction in question.[461] Whether the CJEU indeed follows this approach is not without practical relevance. The objective approach seems paramount if indirect sex discrimination law focuses on the recognition of structural gender inequality by protecting women who take up these gendered responsibilities without reinforcing gender stereotypes regarding the gendered division of labour. Protecting women from measures that create disproportionate disadvantages at the workplace does not directly challenge the underlying traditional gendered division of labour that causes the disproportionate disadvantages.[462] Women may continue to take parental leave or take up part-time work at a higher rate than men. While indirect sex discrimination falls short of imposing positive action duties upon employers and is thus unable to directly tackle the underlying structural inequalities,[463] it is contrary to its aim if it actively discourages men and women from breaking through the gendered division of labour. Accordingly, it should not further discourage men from taking up typically female gender roles by withdrawing from them the protection provided to women in the same situation.[464]

Current approaches across Member States differ, although there seems to be little case law on the issue. As there is little case law on indirect sex discrimination overall, it is not surprising that it only deals with the most obvious issues that disadvantage women. Some Member States' legal definitions clearly require the claimant to belong to the disadvantaged group,[465] while other definitions do not, but the case law nevertheless indicates or suggests that one needs to belong to the disadvantaged group. Some presume that belonging to the disadvantaged group is not a requirement, without clear confirmation within the case law. However, there are a few notable exceptions. In addition to the **Swedish** case discussed above, there was a **Norwegian** case involving a male cabin crew employee who challenged an individual working time scheme inter alia because it indirectly discriminated against women. While the Ombud rejected that a 'particular disadvantage' for women could be demonstrated, it did not query the possibility of the claim due to the male sex of the claimant.[466] While the **Spanish** Constitutional Court has rejected men claiming sex discrimination because of disadvantages generally suffered by women, the argument was made that a norm that is 'declared unconstitutional on grounds of indirect discrimination is void in general and not only in its application to the indirectly discriminated group.'[467] Recently, the court considered that 'although in this case the claimant in the main proceedings is not a woman, the challenged provision is of

458 Judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, ECLI:EU:C:2015:480.
459 Suk, J.C. (2017) 'New Directions for European Race Equality Law' 40 *Fordham International Law Journal* 1211.
460 Burri, S.D. and Cremers-Hartman, A. (2004) 'Geslacht', in de Wolff, D. (ed) *Gelijke behandeling* (Deventer, Kluwer) p. 33; Asscher-Vonk, I. and Burri, S.D. (2002) 'Geslacht', in de Wolff D. (ed) *Gelijke behandeling* (Deventer, Kluwer) p. 27.
461 Judgment of 1 March 2011, *Test-Achats and Others*, C-236/09, ECLI:EU:C:2011:100, para 29; judgment of 1 April 2008, *Maruko*, C-267/06, ECLI:EU:C:2008:179, paras 67-69; judgment of 10 May 2011, *Römer*, C-147/08, ECLI:EU:C:2011:286, para 42; judgment of 12 December 2013, *Hay* v *Credit agricole mutual*, C-267/12, ELCI:EU:C:2013:823, para 33.
462 Collins, H. (2003) 'Discrimination, Equality and Social Inclusion' 66(1) *Modern Law Review* p. 30.
463 Judgment of 13 May 1986, *Bilka* v *Weber von Hartz,* C-170/84, ECLI:EU:C:1986:204, para 43.
464 Mulder, J. (2017) *EU Non-Discrimination Law in the Courts* (Hart Publishing) p. 236.
465 **UK** Equality Act, S19 2(b) the provision, criterion or practice must put 'persons with whom [the claimant] shares the characteristic at a particular disadvantage…'; Section 9 of the **Hungarian** Act CXXV of 2003 on equal treatment and the promotion of equal opportunities defines indirect discrimination as 'a provision that does not constitute direct discrimination and apparently complies with the principle of equal treatment shall constitute indirect discrimination if it puts, to a considerably higher extent, certain persons or groups bearing a characteristic specified in section 8 in a position more disadvantageous than that in which another person or group in a comparable situation is, has been, or would be.'
466 Case 10/1488.
467 Judgment of the Constitutional Court 156/2014, of 29 October 2014, ECLI:ES:TC:2014:156.

universal application to all part-time workers and, indeed, it was applied to the claimant.'[468] In **Belgium**, the Labour Court of Appeal in Mons considered that if women are recognised as facing indirect discrimination because they constitute the majority of the group taking time credit schemes, this would lead to indirect discrimination towards men in a similar situation; however, the decision has been appealed.[469]

5.4 Intersectionality

The term intersectional discrimination as a concept was first coined by Kimberlé Crenshaw to describe the interrelationship between unequal race and gender structures that lead to distinctive disadvantages suffered by African American women.[470] These intersectional disadvantages are not simply cumulative or additional in the way that some experience discrimination on more than one ground at the same time or on different occasions but in different ways. Rather, intersectional discrimination creates disadvantages that differ in quality and interact, and as such they are 'synergistic'.[471] A focus on only one protected characteristic or several characteristics alongside each other is often unable to identify the complex set of disadvantages experienced by those on the intersection and reduces their visibility.

Within the European context, the concept of intersectionality gained increased academic attention after the introduction of the Racial Equality Directive[472] and the Employment Equality Directive,[473] which expanded the number of protected characteristics within the EU context and allowed for some recognition of intersectional or multi-dimensional disadvantages linked to more than one protected characteristic.[474] As recently as 2016, intersectional discrimination has been the subject of a thematic report of the European network of legal experts in gender equality and non-discrimination.[475] Several Member States have also recognised some form of intersectional or multi-dimensional discrimination within their legislation.[476] EU proposals on non-discrimination law also recognise the burden of multiple discrimination that needs to be tackled, including the need to provide a definition of multiple discrimination, pointing out that discrimination can occur on two or more grounds.[477] However, it has been questioned whether this definition indeed captures the 'synergistic' nature of intersectionality, as the attempts to combine grounds

468 Judgment of the Constitutional Court 91/2019, of 12 August 2019, ECLI:ES:TC:2019:91.
469 Labour Court of Appeal in Mons, 23.12.2018, Journal des tribunaux du travail, 2019, p. 26.
470 Crenshaw, K. (1989) 'Demarginalizing the Intersection of Race and Sex', *University of Chicago Legal Forum* 139.
471 Fredman, S. (2016) *Intersectional discrimination in EU gender equality and non-discrimination law* (European Commission, European network of legal experts in gender equality and non-discrimination).
472 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, 19.7.2000, pp. 22-26.
473 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, pp. 16-22.
474 Xenidis, R. (2020) *Beyond the 'Master's Tools': Putting Intersectionality to Work in European Non-Discrimination Law: A Study of the European Union and the Council of Europe Non-Discrimination Law Regimes*; Atrey, S. (2019) Intersectional Discrimination (Oxford University Press); Schiek, D. and Lawson, A. (2011) (eds) *EU Non-Discrimination Law and Intersectionality: investigating the triangle of racial, gender and disability discrimination* (Farnham Ashgate Publishing); Burri, S.D. and Schiek, D. (2009) *Multiple Discrimination in EU Law* (European Commission, European network of legal experts in the field of gender equality) available at: https://www.equalitylaw.eu/downloads/2813-multiple-discrimination; Schiek, D. and Chege, V. (eds) (2008) *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law* (Routledge-Cavendish).
475 Fredman, S. (2016) *Intersectional discrimination in EU gender equality and non-discrimination law* (European Commission, European network of legal experts in gender equality and non-discrimination).
476 Article 6(1) of the **Croatian** Anti-Discrimination Act defines multiple discrimination as discrimination against an individual on multiple grounds enumerated in the Anti-Discrimination Act; the **Czech** Anti-Discrimination Act recognises intersectionality; **Estonia**; **Greek** Act 4604/2019, 'On the promotion of substantive gender equality etc', OJ A 50/26.03.2019, in its Article 2(7) gives for the first time a definition of 'multiple discrimination' on the grounds, inter alia, of sex: any act or omission that places persons in an inferior position on the grounds of sex, sexual harassment and gender identity, in combination with one or more other characteristics, in particular national/ethnic or social origin, age, family status, disability, religious, political or other belief'; **French** courts also recognise intersectional cases and there is ample opportunity under French law, because of the large number of protected characteristics recognised in the law; **Malta** (not yet passed). See also Fredman, S. (2016) *Intersectional discrimination in EU gender equality and non-discrimination law* (European Commission, European network of legal experts in gender equality and non-discrimination).
477 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation COM/2008/0426 final; European Parliament legislative resolution of 2 April 2009 OJ C 137/68 of 27.5.2010.

predominantly seems to focus on additional or cumulative discrimination.[478] Moreover, the segmentation of the protected characteristics into different directives, each covering an different material scope, can in practice hinder detailed engagement with intersectional disadvantages, as it privileges some protected characteristics over others.[479] Nevertheless, it is suggested that the existing EU legal framework is able to tackle some forms of intersectional discrimination within its current scope.[480] Given the closed list of protected characteristics within EU law, it has been suggested in legal doctrine that intersectionality should be organised around race, gender and disability with other grounds such as age, sexuality or motherhood considered adjacent to these or as sub-categories.[481] How the concept of indirect discrimination can indeed assist with the identification of these intersectional disadvantages around these 'nodes' has not been fully explored by the EU legal framework and CJEU case law.

Indirect sex discrimination is able to expose particular disadvantages suffered by groups of women. Its recognition of statistical evidence does not require that all, or even most women, suffer the disadvantages, as long as a statistically meaningful particular disadvantage can be identified. While it may be challenging to come by meaningful statistical data if the pool of comparators is too narrow, additional reference to nationwide systemic disadvantages within a combined qualitative reasoning[482] should allow for a broader recognition of 'particular disadvantages.' If it is then true that women often or predominantly suffer intersectional discrimination,[483] many disadvantages could be identified under the scope of indirect sex discrimination. The concept of vulnerability[484] seems to be particularly useful here as it recognises that vulnerability can be experienced in particular ways, as different available assets can increase or decrease one's resilience and thus reduce or magnify the disadvantages suffered.

Unfortunately, the CJEU has mainly refused to consider intersectional disadvantages within the scope of indirect discrimination. In *Parris*,[485] the CJEU refused to recognise the discriminatory effect of the occupational pension scheme that excluded partners of employees who only married after their 60th birthday from survivor pension benefits, although homosexual couples in Ireland have only been able to marry each other since 2015. Older homosexual couples are thus specifically disadvantaged by this rule, although some heterosexual couples are also affected.[486] Notably, AG Kokott was able to detect this particular disadvantage by reference to indirect discrimination based on sexual orientation alone and only considered the intersectional disadvantage to matter within the context of the objective justification. However, establishing a prima facie case of indirect discrimination on grounds of sexual orientation without recognising the intersectional disadvantage is not straightforward. Specifically, it is not certain that homosexual individuals are de facto more frequently prevented from accessing the survivor pension, given that the relatively young Irish population is able to marry the partner of their choice and older homosexuals may be married to a partner of the opposite sex.[487] However, this does not change the

478 Fredman, S. (2016) *Intersectional discrimination in EU gender equality and non-discrimination law* (European Commission, European network of legal experts in gender equality and non-discrimination).
479 Fredman, S. (2016) *Intersectional discrimination in EU gender equality and non-discrimination law* (European Commission, European network of legal experts in gender equality and non-discrimination).
480 Schiek, D. and Mulder, J. (2011) 'Intersectionality in EU Law: A Critical Re-appraisal' in Schiek, D. and Lawson, A. (eds) *European Union Non-Discrimination Law and Intersectionality: investigating the triangle of racial, gender and disability discrimination* (Farnham Ashgate Publishing) p. 259.
481 Schiek, D. (2011) 'Organising EU non-discrimination law around the nodes of "race", gender and disability?' in Schiek, D. and Lawson, A. (eds) *European Union Non-Discrimination Law and Intersectionality: investigating the triangle of racial, gender and disability discrimination* (Farnham Ashgate Publishing).
482 See section 5.1 above.
483 Recital 14 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, 19.7.2000, pp. 22-26; Recital 3 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, pp. 16-22. See for example regarding disability and gender: Schiek, D. (2016) 'Intersectionality and the notion of disability in EU discrimination law' 53(1) *Common Market Law Review* 35.
484 See section 3.4 above.
485 Judgment of 24 November 2016, *Parris*, C-443/15, ECLI:EU:C:2016:897.
486 Möschel, M. (2017) 'If and when age and sexual orientation discrimination intersect: Parris' 54(6) *Common Market Law Review* 1835; Atrey, S. (2018) 'Illuminating the CJEU's blind spot of intersectional discrimination in *Parris* v *Trinity College Dublin*' 47(2) *Industrial Law Journal*, pp. 278-296.
487 Schiek, D. (2018) 'On uses, mis-uses and non-uses of intersectionality before the Court of Justice (EU)' 18(2/3) *International Journal of Discrimination and the Law* p. 91.

existence of a particular disadvantage in relation to sexual orientation and age that could have been detected within a qualitative assessment. Once this is recognised, the main question would be whether a strict age limit is really appropriate and necessary to prevent so-called deathbed marriages, given that an age limit does not exclude all of these marriages and a less intrusive measure could achieve similar results.

Two recent cases potentially invited the CJEU to consider intersectional disadvantages linked to gender, religion and race or ethnicity in connection with headscarf bans at the workplace, but the Court chose to focus on religious discrimination alone. In *Achbita*,[488] the court considered an obligation of neutrality in relation to philosophical, political or religious beliefs imposed by the claimant's employer to constitute indirect religious discrimination and in *Bougnaoui*,[489] it addressed an employer's request for the employee to remove her headscarf after a client's complaint under the scope of direct discrimination. Neither case considered how these measures disproportionally disadvantage women. After all, women mostly wear headscarves and are excluded from the labour market by measures that require neutrality by the showing of hair. Specifically, the measures regulate women's behaviour in terms of a Western understanding of femininity and gender expression and thus have a specific detrimental effect on (minority) women. It is hard to see how such a strategy is gender neutral.[490]

The failure to consider intersectionality within the scope of indirect sex discrimination is surprising, since the CJEU is not opposed to considering the effect of a measure on women who are in a specific situation. For example, in *Brachner*,[491] it considered an Austrian statutory provision that reserved an exceptional increase in pensions for the year in question exclusively to pensions in excess of EUR 746.99 per month under the scope of indirect sex discrimination, by highlighting the disproportionate effect that this rule had on older women. Specifically, it compared the position of male and female pensioners to identify the group disadvantage. Accordingly, it has been suggested that it recognised the intersection between age and sex discrimination in the specific case.[492] While the narrow focus was further supported by the fact that only pensioners were directly affected by the measure in question, one may also consider that the limitation potentially disadvantages all women, as it decreases their pension rights compared to men. Along these lines, minimum income or working hours have been challenged in previous decisions.[493] An appreciation of gendered vulnerabilities under the scope of indirect sex discrimination could further recognise how measures create disadvantages for women that are in specific situations. This is not limited to the combination of two or more protected characteristics but could refer to other situations as well. For example, if women are more likely to live in poverty, measures that disadvantage the poor could be challenged under the scope of indirect sex discrimination.[494] Other situations may also be relevant, such as single parenting or financial dependency.

There is some evidence that indirect sex discrimination can indeed be useful to address intersectional discrimination within some Member States. For example, the **Norwegian** case concerning the de facto disadvantages suffered by women when employees' contracts are terminated upon reaching the unisex retirement age essentially addressed the specific disadvantages of women in a specific age group who were unlikely to accrue equal pension benefits because of career breaks due to childcare.[495] In a different context, the **UK** Employment Appeal Tribunal recognised how a single mother from St Vincent and the

488 Judgment of 14 March 2017, *Achbita* v *G4S Secure Solutions*, C-157/15, ECLI:EU:C:2017:203.
489 Judgment of 14 March 2017, *Bougnaoui*, C-188/15, ECLI:EU:C:2017:204.
490 Schiek, D. (2018) 'On uses, mis-uses and non-uses of intersectionality before the Court of Justice (EU)' 18(2/3) *International Journal of Discrimination and the Law* p. 95; Holzleithner, E. (2008) 'Intersecting grounds of discrimination: Women, headscarves and other variants of the gender performance' 1 *Juridikum* pp. 33-36.
491 Judgment of 20 October 2011, *Brachner*, C-123/10, ECLI:EU:C:2011:675.
492 Fredman, S. (2016) *Intersectional discrimination in EU gender equality and non-discrimination law* (European Commission, European network of legal experts in gender equality and non-discrimination) p. 72.
493 Judgment of 24 February 1994, *Roks,* C-343/92, ECLI:EU:C:1994:71.
494 Schiek, D. (2016) 'Revisiting intersectionality for EU Anti-Discrimination Law in an economic crisis –a critical legal studies perspective' 2 *Sociologia del Diritto* 23, p. 38.
495 See discussion above. **Norwegian** Equality and Anti-Discrimination Ombud, decision of 29 April 2014, case 13/1307, available at: https://www.ldo.no/arkiv/klagesaker/2014/131307-Diskriminering-pa-grunn-av-alder-og-kjonn.

Grenadines was disadvantaged because of the combined effect of the 24/7 work requirements of the British Army and immigration requirements that prevented her from bringing her sister to the UK to help with childcare.[496] The EAT ruled that 'the nature of discrimination is such that it cannot always be sensibly compartmentalised into discrete categories. Whilst some complainants will raise issues relating to only one or other of the prohibited grounds, attempts to view others as raising only one form of discrimination for consideration will result in an inadequate understanding and assessment of the complainant's true disadvantage.' The intersectional disadvantages were thus recognised without an explicit legal recognition of intersectional discrimination. The **French** Court of Cassation also considered indirect discrimination to tackle intersectional discrimination in the case of an undocumented domestic female worker who was dismissed without compensation.[497]

Most notably, in the past, the **Norwegian** Ombud and Tribunal have recognised how bans on headscarves disadvantage women. Traditionally, these cases were addressed under the scope of direct religious discrimination and indirect sex discrimination.[498] Specifically, it did not matter that the provision was drafted neutrally and potentially banned all kind of headgear or cover, as it disadvantaged women in particular. However, recent cases considered neutrality requirements in relation to uniforms under the scope of indirect religious discrimination only.[499] The gender dimension was ignored, despite the specific concern regarding headscarves (hijab) within the regulation. The latter approach has also been adopted by **German** courts in cases that challenged specific 'neutrality requirements', despite the de-facto ban on the Muslim headscarf that predominantly disadvantages Muslim women.[500]

These cases ignore the gendered dimension of such neutrality requirements that may have a broader scope of application, but de facto primarily ban headscarves and thus disadvantage Muslim women. The headscarf is not just a religious symbol but discussions around it imply racial prejudice and a Western understanding of femininity, gender stereotypes and emancipation. While other female dress codes may easily be challenged under the scope of sex discrimination, the requirement to show one's hair remains unchallenged, even if it is not necessary to carrying out the job in question. In this light, neutrality requirements are not as gender neutral as they seem.[501] That is not to say that they cannot be justified depending on the circumstances. However, an objective justification can hardly be assessed without an appreciation of the de facto disadvantage. In principle, the **German** Constitutional Court recognised this in 2015, when it explained how neutrality requirements for schoolteachers keep Muslim women out

496 **UK** Employment Appeal Tribunal, *Ministry of Defence* v *DeBique* [2010] IRLR 471.

497 Court of Cassation No. 10-20765 3 Nov. 2011. See the comment on the case in section 3.2 above.

498 Decision of 12. June 2007 from the Equality and Anti- Discrimination Ombud; Case 07/627 https://www.ldo.no/globalassets/arkiv/uttalelser_pdf/07_627.pdf; Decision of 20. August 2010 from the Equality and Anti- Discrimination Tribunal; Case 8/2010 (searched in 'old cases') https://www.diskrimineringsnemnda.no/showoldcase/1730; Decision of 1 April 2014 from the Equality-and Anti-Discrimination Tribunals case 2/2014 (searched in 'old cases') https://www.diskrimineringsnemnda.no/media/1610/00d015c25a94f45694ee36f6f638f3e7.pdf. **Austrian** Supreme Court suggested a similar assessment within its orbiter dictum 9 ObA 117/15v, RISJustiz RS0131194, https://www.ris.bka.gv.at/Dokumente/Justiz/JJR_20160525_OGH0002_009OBA00117_15V0000_007/JJR_20160525_OGH0002_009OBA00117_15V0000_007.pdf.

499 Decision of 23 March 2017 from the Equality and Anti-Discrimination Tribunals case 2/2017 https://www.diskrimineringsnemnda.no/media/1807/vedtak-i-sak-2-2017.pdf; Decision of 24 May 2018 from the Equality and Anti- Discrimination Tribunal case 30/2018 https://www.diskrimineringsnemnda.no/media/1874/sak-30-2018-anonymisert-vedtak.pdf. A similar approach is also taken in **Sweden**, see Stockholm District Court judgement T 3905-15 of 16 November 2016. Cf. Norberg, P. (2017) *Country report Non-discrimination Sweden*, European network of legal experts in gender equality and non-discrimination, available at: http://www.equalitylaw.eu/downloads/4388-sweden-country-report-non-discrimination-2017-pdf-1-59-mb; Swedish Labour Court judgement AD 2017 No. 65.

500 The Federal Labour Court, judgment of 12 August 2010, 2 AZR 593/09, stated without any further reasoning that there was no gender discrimination involved; State Labour Court of Berlin and Brandenburg, judgment of 27 November 2018, 7 Sa 963/18, available at: http://www.gerichtsentscheidungen.berlin-brandenburg.de.

501 Schiek, D. (2018) 'On uses, mis-uses and non-uses of intersectionality before the Court of Justice (EU)' 18(2/3) *International Journal of Discrimination and the Law* p. 95; Brems, E., Ouald Chaib S. and Vanhees, K. (2018) '"Burkini" bans in Belgian municipal swimming pools: banning as a default option' 36(4) *Netherlands Quarterly of Human Rights* 270; Brems, E., Heri, C., Ouald Chaib, S. and Verdonck, L. (2017) 'Head-covering bans in Belgian courtrooms and beyond: headscarf persecution and the complicity of supranational courts' 39(4) *Human Rights Quarterly* 882.

of qualified professional work and thus create a tension in relation to the requirement of the de facto equality of women under Article 3(2) of the Basic Law.[502]

Nevertheless, the exclusive focus on religious discrimination seems to be in line with the CJEU judgments in C-157/15 *Achbita* and C-188/15 *Bougnaoui*. The question is then whether the CJEU's ignorance of the gender dimension implies that these cases do not constitute indirect sex discrimination or whether the CJEU has simply not yet been asked to address the question. If the former is taken to be the case, it would potentially reduce the current protection within some Member States.[503] If the latter, the old Norwegian case law remains relevant and EU law does not hinder an engagement with intersectional gender discrimination under the scope of indirect sex discrimination.[504]

5.5 Reasonable accommodation

Finally, it has been suggested in legal doctrine that indirect discrimination implies a duty to accommodate[505] as well as one of redistribution.[506] If EU non-discrimination law indeed protects diversity, and this implies a degree of redistribution, indirect sex discrimination could in principle impose some distributive duties. For example, employers may not refuse to accommodate disadvantaged groups if it does not create a disproportionate burden on them. We have already seen above that redistributive aims are present within direct as well as indirect discrimination. If EU non-discrimination law indeed combines an anti-stereotype approach with duties of recognition,[507] the latter particularly requires some accommodation of diversity. A focus on the exclusion of groups with common characteristics can thus require structural changes to appropriately recognise the needs of structurally disadvantaged groups, even if these needs are not assessed on an individual basis, outside the scope of reasonable accommodation in the context of disability.

The question is then how to distinguish such a duty under indirect sex discrimination law from the duty of reasonable accommodation within disability discrimination. Regarding the latter, the difference may be more straightforward. While indirect disability discrimination addresses group disadvantages, the duty of reasonable accommodation requires an individual assessment of the party involved. It thus accommodates individual needs linked to the disability. Similar individual needs may not be present within the context of sex discrimination unless we take an intersectional perspective. Even then, outside the scope of disability, a link to the needs of groups will often be identified. However, the inclusion of qualitative reasoning for the establishment of a prima facie case of indirect sex discrimination can invite a duty akin to that of reasonable accommodation.

For example, if the measure is identified as disadvantaging without reference to statistics, its abolition or rearrangement may only create direct benefits for one person. In the **UK** case *Edwards*,[508] a flexibility requirement was identified as disadvantaging only one woman but thought to have broader implications for single mothers. The fact that there were very few women and only one single mother employed was then taken as further evidence of the exclusionary effect of the measure. Consequently, the individual's needs had to be taken into account, but by doing so, should create a more inclusive workplace. The broader implications were thus structural. It is not an individual means test, but the needs of single

502 Federal Constitutional Court, judgment of 27 January 2015, 1 BvR 471/10, 1181/10, para 96, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2015/01/rs20150127_1bvr047110.html.
503 Although the EU Equality Directives only provide minimum protection and cannot be used to reduce protection that already exists within the Member States.
504 See comments in the **Norwegian** Questionnaire to this report.
505 Waddington, L. (2011) 'Reasonable Accommodation: Time to extend the duty to accommodate beyond disability?' (2011) 36 *NJCM-Bulletin* 186.
506 Schiek, D. (2016) 'Revisiting intersectionality for EU Anti-Discrimination Law in an economic crisis –a critical legal studies perspective', 2 *Sociologia del Diritto* 23.
507 See section 3.5 above.
508 **England** and **Wales** Court of Appeal, *London Underground Ltd* v *Edwards* [1999] ICR 494 (CA). See also the discussion in section 5.1 above.

mothers that must be considered. Secondly, statistical evidence can reveal disadvantaging effects that are neither foreseeable nor explainable. To abolish them, thus does not respond to a specific identified need of an individual, but has structural inclusionary effects. As such, indirect discrimination can thus create duties to accommodate specific groups, which invites further consideration of the reasonableness of the burden that comes along with this restructuring and is distinct from positive action.

5.6 Conclusion

The section has considered areas that are underdeveloped within the CJEU case law and the EU legal framework and thus create uncertainties and limitations in the concept of indirect sex discrimination as currently understood and applied by the CJEU and the EU legal framework more generally. Predominantly, it focused on gender and intersectional issues and the scope of the substantial duty of the duty bearer under the concept. All of these areas are underdeveloped within the scope of indirect sex discrimination law, which limits the concept's reach and relevance for the fostering of substantive equality. For indirect sex discrimination to adequately respond to structural gender inequality, it needs to consider the different layers of disadvantages that can be experienced by men and women with different backgrounds within the existing gendered structures. To achieve this, indirect sex discrimination law needs to both protect people from the imposition of stereotypes as well as recognising life choices and burdens outside the gendered norms. Depending on the individual case, this may require multiple perspectives and, where applicable, an intersectional approach, that take into account statistical evidence as well as qualitative assessments.

6 Indirect sex discrimination in the socioeconomic context of the Member States

Although the EU concept of indirect sex discrimination law is well developed and established, with significant potential to foster gender equality, its de facto contribution towards a more equal work environment within the Member States is less than certain. Gender pay, employment and pension gaps prevail throughout the European Union, career advancements differ, and jobs with atypical (part-time) work arrangements are often occupied by women, who are also more likely to take parental leave and long-term career breaks due to childcare. The picture within new economies and new forms of labour is less obvious. Although there may be gendered imbalances within the gig economy and on-call work, the area is still underexplored in the Member States. Some areas of the gig economy are not necessarily 'typically female', but much low/medium-skilled care work and cleaning work can also fall under this heading, and represents a sector of work that has long struggled with low pay, temporary and part-time positions and limited labour law protection, as well as quasi-independent work by those who are self-employed and without staff. Beyond that, segregated labour markets continue to be a problem, as the common individual claimant approach towards indirect sex discrimination law struggles to challenge such systemic issues of gender inequality.

Considering that the concept of indirect sex discrimination should be able to identify and address the unequal structures that underpin this inequality, one would assume that it plays a prominent part in the Member States' approaches towards non-discrimination law. However, the existing case law in Member States suggest a rather limited relevance of the concept in the national engagement with issues related to sex discrimination, as cases on direct sex discrimination prevail and the principle of non-discrimination is often engaged with in more general terms, without a specific distinction being made between direct and indirect discrimination. In many Member States, the concept is poorly understood and/or ignored, and Member States across the board report that there are only very few cases of indirect sex discrimination law and even fewer cases where the claim was made successfully. **Liechtenstein** does not have any case law and the courts in **Estonia**, **Luxembourg** and **Malta** have not yet engaged with the concept of indirect sex discrimination despite various opportunities to do so. Other Member States only have a handful of cases to report and many of them are not recent. While it may be tempting to suggest that this demonstrates a limited need for the concept, this is not likely, given the structural inequalities known to exist and the fact that there are cases on direct sex discrimination.

The focus on indirect sex discrimination may be further reduced by the introduction of additional protected grounds such as parenthood or parental leave. Courts can then consider the issue under the scope of direct parenthood discrimination, rather than exploring the structural gender inequality that has led to the disadvantage in the first place. While this may not always produce a different outcome, it does hinder a proper engagement with and recognition of gender inequality. Although progress has been made in light of CJEU interventions regarding specific measures that are deemed to be discriminatory, and whilst the EU legal framework is generally considered to be appropriate, CJEU case law has also confused or halted the movement towards a proper engagement with measures that create particular group disadvantages in some Member States. For example, the **Belgian** expert notes that the CJEU decision in *Commission* v *Belgium* has halted the development of a concept of indirect sex discrimination in Belgium.[509] In the case, the CJEU accepted that a condition that made entitlements dependent on the number of dependents and cohabitation was justified under EU non-discrimination law.[510]

On the whole, the potential of indirect sex discrimination to foster substantive gender equality has not been realised. The reasons for that are complex and range from different socioeconomic, cultural, and historical factors within the Member States to structural limitations within the concept itself. Since there is limited scope to address comparative findings that would require an in-depth socioeconomic comparative

509 Judgment of 7 May 1991, *Commission* v *Belgium* C-229/89, ECLI:EU:C:1991:187; **Belgian** Questionnaire to this report.
510 See section 4.4.3 above.

analysis,[511] the discussion below will focus on the conceptual limitations of the concept by reference to some issues that are common across the Member States. Although some of these limitations are the result of the requirements developed by the CJEU, some are also inherent to the concept itself: its symmetric nature based on comparison will always struggle to capture (economic and social) inequalities on a broader scale. While the group approach does capture some of the structural disadvantages, the predominantly individualist claim procedures dominant within most Member States and a limited frame of reference will often leave systemic disadvantages undetected. Indirect sex discrimination law can thus not replace more substantive social welfare norms or positive action. This should not negate the fact that national courts may also misapply the concept in their jurisprudence, by re-inviting questions of intent or personal choice into their analysis, contrary to the principles set out in *Bilka*.[512] To ensure its effectiveness, further understanding of the concept needs to be promoted within the Member States' national courts and the wider population.

6.1 Indirect sex discrimination and part-time work

Addressing discrimination against part-time workers within and outside the scope of indirect sex discrimination is one of the most developed areas of EU non-discrimination law. The CJEU developed its concept of indirect sex discrimination with a focus on part-time workers and discrimination against them is often used as the seminal example of indirect sex discrimination. However, it should not be forgotten that the level of part-time work varies between the Member States.[513] Especially in labour markets that experience low wages, part-time work is usually only entered into if no full-time work can be found, as families require two full incomes. Countries such as **Finland**, **Iceland** and **Ireland** also report low numbers of part-time work. It has been suggested that in some countries it was more common for women to take long leave and then return to a full-time position than to take up part-time work. While there can still be a gendered element within the scope of part-time work, a focus on this alone will certainly not address the more subtle structures of gender inequality that disadvantage women within employment. The established case law thus has limited reach, as it does not speak to the situation within all the Member States.

In Member States where part-time work is common and gendered, it is identified as a major factor for the gendered pay, income and pension gap, without real prospects for change. It has been observed in **Germany**, for example, that more women participate in the labour force but that this has not increased their total hours.[514] This suggests that more women share the same work and thus are more likely to enter part-time positions. The **Dutch** labour market also demonstrates a significant imbalance between male and female part-time work.[515] While studies suggest that women in all age groups predominantly choose to work part time, these 'choices' are apparently made mainly by women and carry significant disadvantages.[516] Certainly, working fewer contractual hours reduces the overall income, which has knock-on effects for subsequent entitlements (such as pension rights, income-related parental-leave pay), which can hardly be addressed within a symmetric concept of indirect sex discrimination that focuses on comparative disadvantages. Nevertheless, even beyond that, discrimination within part-time work is

511 There are several (comparative) studies that focus on EU non-discrimination law within the national context. Foubert, P. (2017) *The enforcement of the principle of equal pay for equal work or work of equal value* (European Commission, European network of legal experts in gender equality and non-discrimination); Masselot, A. (2018) *Family leave: enforcement of the protection against dismissal and unfavourable treatment* (European Commission, European network of legal experts in gender equality and non-discrimination); Havelková B. and Möschel, M. (eds) (2019) *Anti-Discrimination Law in Civil Law Jurisdictions* (Oxford University Press); Mulder, J. (2017) *EU Non-Discrimination Law in the Courts* (Hart Publishing); Havelková, B. (2017) *Gender Equality in Law: Uncovering the Legacies of Czech State Socialism* (Hart Publishing).

512 Judgment of 13 May 1986, *Bilka* v *Weber von Hartz,* C-170/84, ECLI:EU:C:1986:204.

513 European Commission (2020) *Employment and Social Developments in Europe 2020*, available online https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8342&furtherPubs=yes#:~:text=The%20Commission's%202020%20edition%20of,is%20more%20important%20than%20ever.

514 **German** Questionnaire to this report.

515 **Dutch** Questionnaire to this report.

516 Burri, S.D. (2000) *Tijd delen. Deeltijd, gelijkheid en gender in Europees en nationaalrechtelijk perspectief* dissertation, Utrecht University Europese Monografieën 66 Kluwer.

persistent as it comes in many forms. National courts thus need to be willing to identify disadvantages by considering when the *pro-rata temporis* approach is appropriate, as it reflects the difference in working time, and when a more direct comparison with full-time pay is preferable. It was only in 2019 that the **Spanish** Constitutional Court reviewed a partiality coefficient that reduced the pensions of part-time workers more than according to their lesser working time.[517] The **Dutch** Appeal Court Arnhem-Leeuwarden, considering guaranteed compensation for employees attending training, ruled that the guarantee meant that not the salary per month, but the hourly rate had to remain the same. The employee concerned worked more hours after the training, but for a lower hourly rate.[518] In the Netherlands, the *pro-rata temporis* principle was also considered relevant regarding a rule within a collective agreement (the so-called senior rule) that reduced the working time of employees who were older than 60 by 30 minutes per day on average. The Amsterdam Appeal Court applied the *pro-rata temporis* principle in a case involving an employee who worked 0.8 of full time. The employee was entitled to a working time reduction of 24 minutes per day.[519] In 2015, the **German** Federal Labour Court ruled that the occupational pension must be calculated in such a way that it is granted in the amount corresponding to the exact proportion of the female part-time employee's working time compared to the working time of a comparable full-time employee.[520] The German Federal Constitutional Court and the Federal Administrative Court decided that statutory reductions of retirement pensions due to former part-time work violated the constitution as well as EU non-discrimination law.[521] Numerous other examples are available within the Member States. The point is not so much that courts do not apply indirect sex discrimination properly or that the concept cannot address many of the disadvantages arising from part-time work. Rather, even if the EU concept of indirect sex discrimination is in principle able to address these types of discrimination, it continues to be a permanent struggle without an obvious cultural shift. Given the low number of cases overall, it is thus likely that most of the disadvantages remain unchallenged, despite the CJEU's detailed engagement with part-time discrimination both inside and outside the scope of indirect sex discrimination.

An area of unresolved difficulty is the issue of training that is compensated depending on the previous salary, irrespective of the time spent on the training, as considered in *Bötel* and *Lewark*.[522] In that regard, it may be useful to distinguish between work-related training directly linked to the employment tasks, activities and contract on the one hand, and training related to collective or work council activities that are voluntary and independent from the employment contract on the other. The former certainly entitles the employee to full compensation, as it constitutes pay. If training courses are completed during full-time hours, part-time workers need to be fully compensated for them. Accordingly, the **Dutch** Equal Treatment Commission ruled that a practice established the salary for full-time training at the rate of the previous employment, without taking into account that previous part-time occupation disadvantaged women in particular, because women are more likely to work part time for family reasons. Therefore, the practice constituted indirect discrimination on the ground of sex.[523] However, the issue is a little more complicated if we consider compensation for training related to voluntary activities that fall outside the scope of the employment contract, such as training related to collective and work council activities. While the CJEU in *Bötel* and *Lewark* considered such national rules under the scope of indirect sex discrimination law, it has left some space for these considerations within the scope of the objective justification.[524] This is understandable considering that that employer cannot necessarily be expected to compensate for time spent on training courses and participating in such a course should not lead to an increase in the part-

517 Judgment of the Constitutional Court 91/2019, of 12 August 2019, ECLI:ES:TC:2019:91; judgment of 22 November 2012, *Elbal Moreno*, C-385/11, ECLI:EU:C:2012:746.

518 Arnhem-Leeuwarden Appeal Court, 26 March 2013, ECLI:NL:GHARL:2013:BZ5450. See also the discussion in section 4.3.1 above on the pro-rata approach.

519 Amsterdam Appeal Court, 19 August 2014, ECLI:NL:GHAMS:2014:3425.

520 **German** Federal Labour Court, judgment of 14 July 2015, 3 AZR 594/13.

521 Federal Constitutional Court, judgment of 18 June 2008, 2 BvL 6/07, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2008/06/ls20080618_2bvl000607.html, and Federal Administrative Court, judgment of 12 December 2012, 2 B 90/11, https://www.bverwg.de/121212B2B90.11.0.

522 Judgment of 4 June 1992, *Bötel*, C-360/90, ECLI:EU:C:1992:246; judgment of 6 February 1996, *Lewark*, C-457/93, ECLI:EU:C:1996:33.

523 Dutch Equal Treatment Commission, opinion 2012-76 available at: https://mensenrechten.nl/nl/oordeel/2012-76.

524 See section 4.3.1 above.

time workers' remuneration. However, if part-time workers are not paid fully for the time spent on these courses, they are less likely to access and participate in them. After all, they will be required to sacrifice some of their free time, much of which will already be allocated to different tasks and responsibilities, while full-time workers can complete the course during their working time. The lack of equal access is then likely to reduce the representation of part-time workers on work councils. With part-time voices not being heard regularly, it is likely that part-time work will be treated or viewed as atypical employment that is fundamentally different to regular employment and not a normal choice for many employees. Enabling their participation in workers' representation mechanisms is thus important for the recognition of part-time workers' needs and contributions and can helpt to weaken the male full-time standard norm. Since access to and involvement in workers' organisations falls under the scope of employment conditions,[525] it is indeed relevant that these practices are likely to reinforce disadvantages related to part-time work that are most commonly experienced by women. In that regard, one only need consider the number of collective agreements that fail to fully recognise the indirectly discriminatory effects of their agreed measures, criteria or practices.

Outside the scope of pay, there is significant evidence that suggests that part-time work impedes access to training, and to career progression (including pay progression) and promotion.[526] This suggests that expectations regarding job performance, experience and the employee's added value to the company or undertaking are still measured using the norm of a full-time worker. This is difficult to challenge if promotion procedures do not use defined measurements whose apparently neutral character can then be tested with reference to statistics. While national courts have felt able to address the most serious impact on career advances,[527] there is much uncertainty about how to identify these disadvantages. This is especially true if de facto statistical imbalances in promotion procedures alone are not considered relevant.

Finally, part-time work that somehow falls outside the norm continues to suffer significant disadvantages. This can be because it is so minimal that it falls below the social security threshold, as this kind of employment often does not enjoy similar employment and social protection as 'regular' full-time and part-time work,[528] or because its contractual obligations differ somewhat, e.g. in zero-hour contracts (discussed below). The CJEU has always adopted a broad understanding of part-time work, and in that regard the meaning of work in general, as it only excludes from the meaning of work economic activities that are neither effective nor genuine because they are 'on such a small scale as to be regarded as purely marginal and ancillary'.[529] However, in national law, a distinction between regular full-time and part-time work and other hourly paid work has arisen and modern work arrangements are likely to increase the number and relevance of these 'irregular' arrangements that are difficult to fit within the current scope of indirect sex discrimination based on a more stable or traditional organisational structure. This is also reflected within the national reforms of the social security system. For example, the **French** expert notes:

525 Article 14(1)(b) Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, pp. 23-36.

526 The **UK** Questionnaire to this report stated: The 2019 Modern Families Index found that parents working part time had just a 21 % chance of being promoted within the next three years, compared to 45 % for their full-time counterparts.

527 A Paris Court of Appeal's decision establishes that a woman was harmed because her part-time status prevented her career advancement (Court of Appeal No. 14/07296, 16 June 2015 *Mme L T* v *RATP*). In another Paris Court of Appeal's decision, a female employee was not promoted as sales manager for 17 years without justification and maintained in lower level positions and limited activity establishing sex discrimination (Court of Appeal No. 14-00903, 01 April 2015).

528 See e.g. Austrian Supreme Court 8 ObS 5/11k; German law on 'geringfügige Beschäftigten'; judgment of 22 November 2012, *Elbal Moreno*, C-385/11, ECLI: EU:C:2012:746; There is also French case law on the right to a supplementary retirement system being indirectly discriminatory against women, requiring a certain number of hours worked (Soc., 3 July 2012, No. 10-23.013, JCP S 2012, 1490, note J.-Ph. Tricoit).

529 Judgment of 23 March 1982, *Levin*, C-53/81, ECLI:EU:C:1982:105 paras 21-22; judgment of 3 July 1986, *Lawrie-Blum*, C-6/85, ECLI:EU:C:1986:284.

> 'Beyond case law, there is an important reform of the French unemployment system,[530] which will change the length of work for entitlement and the method of calculation of unemployment benefits, which will disadvantage workers in precarious jobs, working intermittently.[531] Instead of having to work 4 months in the last 28 months, the worker will have to have worked 6 months in the last 24 months to be entitled to unemployment benefits. Moreover, the amount of unemployment benefits will be based on the average monthly pay and not only on the days worked so this creates a disadvantage for both discontinuous work and part-time work'.[532]

6.2 Indirect discrimination and parental leave

Another common theme within the Member States is that of disadvantages due to parental leave or parenthood. Nevertheless, parental leave issues are often not construed as indirect sex discrimination, especially if parental leave/parenthood has its own protections (e.g. separate strong protections in a law on parental leave) or it is common for fathers to take leave, too. Even then, women are more likely to take parental leave and there is evidence that women are more likely to suffer a motherhood penalty than fathers, even if they both take leave. The disadvantages are thus not limited to taking the leave but imply more general presumptions and stereotypes about the role of motherhood and mothers' limited commitment and contribution to work. It has to be stressed that some of these stereotypes may be true in some cases. If women are responsible for the majority of childcare, it is not surprising that they struggle to commit as much time and focus to their work as someone without these childcare responsibilities. There are thus two interlinked issues.

One of those issues arises from the disadvantages that flow directly from being on parental leave or having taken the leave in the past. The EU framework on parental leave certainly provides protection, for example regarding promotion, retention of position and redundancy payments,[533] but the systems of the Member States differ so widely that a common approach is difficult to identify.[534] In particular, it is uncertain how the CJEU's approach to distinguishing maternity and parental leave and the loser entitlements regarding the latter can ensure that parental leave does not produce indirect sex discrimination. Apart from the fact that maternity and parental leave is often not properly distinguished in the case law of the Member States, it is not always clear in what context parental leave should or should not be considered within the scope of indirect sex discrimination. Disadvantages linked to parental leave can constitute indirect sex discrimination, especially if they relate to long-term disadvantages regarding pay, seniority or redundancy. The Work-life Balance Directive 2019/1158, like its predecessor the Parental Leave Directive 2010/18/EC, provides special rights to parents and carers. First, the directive provides specific entitlements to leave and some payment during leave. Secondly, the Work-life Balance Directive explicitly protects parents from discrimination based on their application or enjoyment of leave.[535] However, these special rights then put parents on leave in a different situation, which can potentially reduce the opportunities to challenge

530 **France**, Executive order No. 2019-797 26 July 2019 (*Décret n° 2019-797 du 26 juillet 2019 relatif au régime d'assurance chômage*), https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000038829574&categorieLien=id.

531 Caihol, A. (2019) 'Les femmes premières victimes de la réforme de l'assurance chômage' *Libération* 18 July 2019 available at: https://www.liberation.fr/france/2019/07/18/les-femmes-premieres-victimes-de-la-reforme-de-l-assurance-chomage_1740502; Lecoq, T. (2019) 'Devinez qui pâtira de la réforme de l'assurance chômage', *Slate* available at: http://www.slate.fr/story/183627/inegalites-salariales-femmes-hommes-reforme-assurance-chomage-precarisation.

532 Caihol, A. (2019) 'Les femmes premières victimes de la réforme de l'assurance chômage' (2019) *Libération* 18 July 2019 available at: https://www.liberation.fr/france/2019/07/18/les-femmes-premieres-victimes-de-la-reforme-de-l-assurance-chomage_1740502.

533 Article 10-12 Directive 2019/1158/EU of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, OJ L 188, 12.7.2019, pp. 79-93; Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (Text with EEA relevance) OJ L 68, 18.3.2010, pp. 13–20; judgment of 20 June 2013, *Riežniece*, C-7/12, ECLI:EU:C:2013:410; judgment of 22 October 2009, *Meerts*, C-116/08, ECLI:EU:C:2009:645; judgment of 27 February 2014, *Rogiers* v *Lyreco Belgium*, C-588/12, ECLI:EU:C:2014:99; judgment of 8 May 2019, *RE* v *Praxair MRC*, C-486/18, ECLI:EU:C:2019:379.

534 Masselot, A. (2018) *Family leave: enforcement of the protection against dismissal and unfavourable treatment* (European Commission, European network of legal experts in gender equality and non-discrimination).

535 Work-life Balance Directive 2019/1158, Article 11.

differential treatment or pay under the scope of indirect sex discrimination law. On the one hand, it means that workers who are not entitled to the leave (e.g. because they are not parents or carers) cannot make a claim of indirect discrimination just as men cannot challenge mothers' maternity leave entitlement under the scope of sex discrimination law.[536] On the other hand, it means that parents taking such leave are not entitled to equal treatment if the Directive provides for alternative arrangements. For example, they are not entitled to equal pay, but only to a payment or allowance as provided for in the Directive.[537] Similarly, the maintenance payment during maternity leave is distinguished from pay and thus not comparable.[538] Compared to maternity leave, the CJEU has generally assumed a worker on parental leave to be less integrated in the work environment and has thus accepted further reduction of employment rights during parental leave.[539] For example, a Christmas bonus that depended on the sole condition that the worker is in active employment when it is awarded, could exclude periods of parental leave but not periods of maternity leave.[540] The distinction between maternity and parental leave thus becomes paramount.[541] Moreover, the scope of the Work-life Balance Directive 2019/1158 can reduce the scope of inquiries under the concept of indirect sex discrimination law in more subtle ways. For example, in *Ortiz Mesonero*[542] the CJEU did not consider an employee's failed application to cease working shifts within the context of national parental leave provision under the scope of indirect sex discrimination. Under the national law, parental leave required some sort of working time reduction while the claimant was interested in avoiding shift work only. He argued that the requirement to reduce working time constitutes a 'particular disadvantage' under the scope of indirect sex discrimination because more women than men take parental leave.[543] However, the CJEU rejected this, because the Parental Leave Directive did not provide a right to flexible working arrangements that could potentially reduce shift work. A separate consideration of these rules under the scope of indirect sex discrimination was not conducted. However, the CJEU approach may differ in the future given that Article 9 of the Work-life Balance Directive 2019/2258 provides a right to request flexible working arrangements.

The distinction between maternity and parental leave and their different assessment under the scope of non-discrimination law creates significant uncertainty within the national case law. For example, the **Danish** courts have drawn a distinction between loss-independent redundancy pay and pay during the notice period. While the former needs to be calculated in line with the employees' previous contract, pay during the notice period covers de-facto loss of income. Since the claimant would have been on unpaid parental leave, there was no need for full pay.[544] However given the recent CJEU judgment in CJEU *Praxair MRC*, it seems difficult to uphold this distinction.[545] In fact, the **French** decision following the preliminary reference in *Praxair* considered the calculation of redundancy payments and redeployment allowances on the basis of the employee's part-time parental leave pay and not her full-time employment to constitute indirect sex discrimination.[546] Moreover, in the absence of a collective agreement, French law requires pay to be increased during maternity leave according to the average general pay increases and the average increase of the individual pay rises paid to employees in the same professional category during the leave, or just the average of individual rises generally. The Court of Cassation recently applied this rule in a 2018

536 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, pp. 23-36, Article 2(2)(c).
537 Work-life Balance Directive 2019/1158, Article 8.
538 Judgment of 27 October 1998, *Boyle and Others*, C-411/96, ECLI:EU:C:1998:506; judgement of 13 February 1996, *Gillespie and Others*, C-342/93, ECLI:EU:C:1996:46.
539 See for example, judgment of 4 October 2018, *Dicu*, C-12/17, ECLI:EU:C:2018:799 on occurring annual leave during maternity and during parental leave. Work-life Balance Directive 2019/1158, Article 10 also addresses the maintenance of acquired employment rights.
540 Judgment of 21 October 1999, *Lewen*, C-333/97, ECLI:EU:C:1999:512.
541 Judgment of 18 November 2004, *Brandenburg* v *Sass*, C-284/02, ECLI:EU:C:2004:722.
542 Judgment of 18 September 2019, *Ortiz Mesonero*, C-366/18, ECLI:EU:C:2019:757.
543 Regarding the opportunity for male claimants to seek protection under the scope of indirect discrimination law although men do not disproportionally suffer the 'particular disadvantage', see the discussion in section 5.2 above.
544 **Danish** Supreme Court ruling in 2014, case U.2015.649H.
545 Judgment of 8 May 2019, *RE* v *Praxair MRC*, C-486/18, ECLI:EU:C:2019:379; judgment of 22 October 2009, *Meerts*, C-116/08, ECLI:EU:C:2009:645.
546 Court of Cassation, 11 July 2018, 16-27.825.

case, rejecting the possibility for the employer to compensate for the difference in pay with an exceptional bonus. This case on bonuses has the potential to apply to parental leave, as well, which has generated the same question concerning bonuses linked to presence in the firm. The **German** Courts also draw specific distinctions depending on the purpose of the payment.[547] Specifically, redundancy payments are designed to make the loss of employment reconcilable by protecting the workers' status. Accordingly, the previous income is relevant, unless it recently changed and living standards have not yet been adjusted. Redundancy payments can also depend on seniority because longer tenure makes the job loss more serious. It then concluded that parental leave needs to be included when calculating seniority for the purpose of redundancy payments but not necessarily for the purpose of pay rises[548] or occupational pensions[549] and only potentially for promotions.[550] However, employees who work part time because of childcare responsibilities do not enjoy similar protection (i.e. being viewed as full-time workers) because this would constitute the preferential treatment of parents.[551] As it is difficult to return to full-time employment once part-time contracts are entered into and there is limited worktime flexibility linked to part-time parental leave,[552] it may be more beneficial for women to choose longer periods of parental leave rather than part-time positions to balance childcare and work responsibilities. However, long-term leave can also effectively exclude women from employment and has obvious financial consequences during and after the leave. It is often very difficult to return to work after a number of years and there is significant evidence that women suffer disadvantages when they do. In 2016, the German Federal Constitutional Court held that the application of the Federal Parental Leave and Parental Allowances Act, instead of the more beneficiary regulations on special dismissal protection in case of collective redundancies, puts female workers at a disadvantage contrary to the constitutional prohibition of sex discrimination under Article 3(2) of the German Basic Law.[553] All in all, this demonstrates the rather confusing picture which is also present in other Member States, regarding the disadvantages linked to parental leave, whether they constitute indirect sex discrimination at all, and if so, whether this can be justified.

In a similar vein, the CJEU's inconsistent assessment of pregnancy-related illnesses and pay before and after birth[554] has led to a reduction of rights in the **Netherlands**. With reference to *McKenna*, the Amsterdam Court took the view that there was no entitlement to a bonus over periods of pregnancy-related illness after the end of maternity leave.[555] The Equal Treatment Commission initially followed a different line of reasoning that recognised the connection between pregnancy, pregnancy-related illnesses and sex, but has since abandoned this approach as a reaction to the judgment.[556]

Apart from the uncertainties regarding the disadvantages that flow from taking parental leave, there are questions arising from the way parental leave can be taken. This refers on the one hand to questions touched upon in *Ortiz Mesonero*.[557] In this case, the claimant hoped to amend his work schedule consisting

547 **German** Federal Labour Court 1 AZR 316/08 (22.09.2009) BAGE 132, 132; 1 AZR 58/02 (12.11.2002) BAGE 103, 321; 1 AZR 407/02 (24.10.2003) BAGE 108, 147; 1 AZR 316/08 (22.09.2009) BAGE 132, 132.

548 Federal Labour Court, judgment of 21 November 2013, 6 AZR 89/12, and judgment of 27 January 2011, 6 AZR 526/09; State Labour Court of Baden-Württemberg, judgment of 17 June 2009, 12 Sa 8/09; Labour Court of Heilbronn, judgment of 3 April 2007, 5 Ca 12/07.

549 **German** Federal Labour Court, judgment of 20 April 2010, 3 AZR 370/08; judgment of 12 February 2013, 3 AZR 100/11; Federal Labour Court, judgment of 9 October 2012, 3 AZR 477/10; Administrative Court of Freiburg, judgment of 20 February 2018, 5 K 4853/16; Administrative Court of Berlin, judgment of 31 May 2011, 28 A 199.08.

550 Administrative Court of Sigmaringen, judgment of 20 February 2018, 7 K 6063/16 regarding the promotion of solders.

551 Mulder, J. (2017) *EU Non-Discrimination Law in the Courts* (Hart Publishing), pp. 219-224.

552 A recent **French** study showed that there is limited worktime flexibility linked to parental leave: once the choice of part-time or full-time parental leave has been chosen, the employee cannot modify it without the agreement of the employer or if a collective bargaining agreement allows it: High Council of the Family, Childhood and Age (Haut Conseil de la Famille, de l'enfance et de l'Age) (2019) *Avenues for reform of parental leave in a global strategy of child care* (Voies de réforme des congés parentaux dans une stratégie globale d'accueil de la petite enfance), available at: http://www.hcfea.fr/IMG/pdf/2019_HCFEA_Rappport_Conges_PreParE_VF.pdf, p. 202.

553 **German** Federal Constitutional Court, judgment of 8 June 2016, 1 BvR 3634/13: http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/06/rk20160608_1bvr363413.html; Federal Labour Court, judgment of 26 January 2017, 6 AZR 442/16.

554 Judgment of 8 September 2005, *McKenna*, C-191/03, ECLI:EU:C:2005:513.

555 Amsterdam Appeal Court, 27 April 2010, JAR 2010/142.

556 **Dutch** Equal Treatment Commission, 19 May 2011, JAR 2011/155.

557 Judgment of 18 September 2019, *Ortiz Mesonero*, C-366/18, ECLI:EU:C:2019:757.

of various shifts to a fixed one, without reducing his ordinary hours of work. While the Parental Leave Directive 2010/18/EC does not provide for such a right, the CJEU all too quickly dismissed any concerns under the scope of indirect sex discrimination. Certainly, taking parental leave will always involve some disadvantages regarding pay or labour market participation. Given that women are much more likely to take parental leave, they are also more likely to carry that burden. It is thus not obvious why less harmful alternatives should not be considered. Similar concerns have been raised in the Member States regarding access to flexible working time arrangements that could enable women to balance employment and domestic responsibilities. Although the Work-life Balance Directive 2019/1158 does provide a right to request flexible working time,[558] it would be useful to explore more stringent measures that can help parents to balance parental and work responsibilities without creating the disadvantages that are related to long-term absence from work. The question is then whether current policies can indeed be reviewed under the scope of indirect sex discrimination, even if the Work-life Balance Directive 2019/1158 does not provide for them. Of course, it will often be possible to justify a limited range of ways parental leave can be taken. However, it would still be useful to consider these rules in a holistic manner, taking into account the entire working population and what detriments any parental entitlements and their limits carry for them.

In addition, the way parental leave is available to parents of both sexes deserves closer examination within the context of indirect sex discrimination law. Although parental leave is in principle available to both parents within all Member States, the use of the leave is extremely gendered across Member States.[559] The specific time taken and the way parents split the leave varies between the Member States, but low or no pay during the leave makes it more likely for the parent that makes less money to take the leave and in some cases for workers with very low pay to take the leave for longer. While Article 8 of the Work-life Balance Directive does provide for a payment or allowance, it does not have to cover the full or a percentage of the previous pay. Rather, the Directive requires that the 'payment or allowance shall guarantee an income at least equivalent to that which the worker concerned would receive in the event of a break in the worker's activities on grounds connected with the worker's state of health.' While this is certainly an improvement, it is unlikely to make much of a difference for those families that purely or mostly rely on the father's income. Indeed, Member States that already provide some but relatively low pay during parental leave, have not seen a significant change in the way parents split their parental responsibilities and leave, with financial concerns being considered one of the main reasons.[560] It may also often be more affordable for mothers to stay at home than to pay for private childcare that potentially can be very expensive. Consequently, women continue to be the primary care givers. A closer examination of the leave provisions could expose how these forms of leave unintentionally maintain these structures. First, in that regard, some Member States still reserve certain support for childcare for the mother[561] and provide long-term maternity leave that focuses on childcare rather than the mothers' biological condition after birth.[562] Secondly, while more and more Member States have modified their parental leave provisions to directly encourage fathers to take some of the leave (mainly by providing non-transferable leave to fathers including some pay), this has not significantly changed the way parents divide the labour of care. While the reasons for this are diverse and in some cases dictated by financial necessities, as parents often cannot afford to give up the main household income,[563] EU non-discrimination law does not provide a sufficiently clear framework to analyse these different forms of leave. The newly introduced birth-related

558 Directive 2019/1158/EU of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, OJ L 188, 12.7.2019, pp. 79-93.

559 European Institute for Gender Equality, Gender Equality Index, 'Work-life balance 2019' available at: https://eige.europa.eu/gender-equality-index/thematic-focus/work-life-balance/parental-leave-policies.

560 Mulder, J. (2018) 'Promoting substantive gender equality through the law on pregnancy discrimination, maternity and parental leave' 1 *European Equality Law Review* 39.

561 See for example, **Italy's** childcare vouchers that are only available for mothers.

562 De la Corte-Rodriguez, M. (2019) *EU Law on Maternity and Other Child-Related Leaves: Impact on Gender Equality* (Kluwer Law International).

563 Mulder, J. (2018) 'Promoting substantive gender equality through the law on pregnancy discrimination, maternity and parental leave' 1 *European Equality Law Review* 39.

leave in **Spain** may serve as an example. The relevant sections from the Spanish Questionnaire to this report read as follows:

> 'Spanish legislation on parental leave has recently been modified by Royal Decree 6/2019, of 1 March 2019,[564] with the explicit aim to ensure (more) effective equality between women and men in employment.
>
> On the one hand, the Royal Decree has substituted maternity and paternity leaves with a new "birth-related" leave that is granted to the mother and "the other parent" (in order to include homosexual couples). The new birth-related leave has the same duration for both parents, 16 weeks, of which the first six immediately after the birth are compulsory. After those first six weeks, the suspension of the contract might be distributed until the child is 12 months, but remaining weeks cannot be transferred from one parent to the other. There is the possibility to extend the leave in case of a child with disabilities or in case of multiple births. The new birth-related leave also applies in the case of adoption, legal guardianship or fostering. The Royal Decree establishes a transition period during which the other parent's leave will gradually be increased. The full duration of the birth-related leave for both parents will be equalized on 1 January 2021.
>
> It is still too soon to ascertain the impact of these changes. However, the mixed nature of the new leave, that contemporaneously protects family life, co-responsibility, the protection of the biological condition of women who have given birth or are breastfeeding, and the protection of maternity and mothers in employment relations, cast some doubts as to its classifications along the lines of direct/indirect discrimination and its fit with Directive 92/85.'

In that regard we should recall that the CJEU requires maternity and parental leave to be distinguished according to substantive parameters. It is not the name of the leave that is important but its purpose.[565] If it aims to protect 'the woman's biological condition and the special relationship between the woman and her child', it constitutes maternity leave.[566] Accordingly, it may not lead to less favourable treatment if only available to mothers. Leave that is focused on general childcare constitutes parental leave and needs to be equally accessible for fathers and mothers.[567] Accordingly, transferable leave that can be given to the father but only if there is an initial entitlement of the mother must be considered suspect. Firstly, if the leave is transferable it surely cannot focus on the biological condition of the mother but rather deals with childcare in more general terms. Secondly, if it then depends on the initial right of the mother, and thus requires mothers to be employed in order for them to transfer their right to the father (or other parent), the latter does not have equal access to the leave. Accordingly, the allocation is discriminatory. However, the CJEU has not been completely consistent within its own approach. For example, it considered a leave that was transferable after the first six weeks if the mother had an initial right to the leave, under the scope of maternity leave despite its transferability clearly demonstrating a focus on general childcare.[568] While it is difficult to distinguish the material facts of the cases, it may have mattered that the transferable leave in the later case (after the first 6 weeks) still fell within the period of minimum maternity leave guaranteed by Article 8 of Pregnancy Directive 92/85/EC (14 weeks including 2 weeks compulsory leave). As such, it may have made sense to consider the leave to relate to maternity. After all, the provision did implement the Pregnancy Directive and the Court has insisted that maternity and parental leave have to be distinguished.

564 **Spain**, Royal Decree for urgent measures to guarantee of equal treatment and opportunities between women and men in employment and occupation (*Real Decreto-ley 6/2019, de medidas urgentes para garantía de la igualdad de trato y de oportunidades entre mujeres y hombres en el empleo y la ocupación*), of 1 March 2019, https://www.boe.es/boe/dias/2019/03/07/pdfs/BOE-A-2019-3244.pdf

565 Judgment of 18 November 2004, *Brandenburg* v *Sass*, C-284/02, ECLI:EU:C:2004:722.

566 Judgment of 18 November 2004, *Brandenburg* v *Sass*, C-284/02, ECLI:EU:C:2004:722 paras 34-39; judgment of 16 February 2006, *Carmen Sarkatzis Herrero* v *Instituto Madrileño de la Salud*, C-294/04, ECLI:EU:C:2006:109.

567 Judgment of 30 September 2010, *Roca Álvarez*, C-104/09, ECLI:EU:C:2010:561; judgment of 16 July 2015, *Maïstrellis*, C-222/14, ECLI:EU:C:2015:47.

568 Judgment of 19 September 2013, *Betriu Montull*, C-5/12, ELCI:EU:C:2013:571.

Moreover, the CJEU case law on the distinction between parental and maternity leave does not properly separate the mothers' biological condition and childcare, as it retains the rather outdated reference to the 'mother's special relationship with the child' within the context of the former.[569] This has long been criticised because it affirms a stereotypical understanding of motherhood that includes a special relationship with the child and does not recognise the equal responsibility of both parents to take care of their children from the moment they are born.[570] It is also not always obvious how to distinguish the care relationship from general childcare protected under parental leave provisions. Since patterns of care and the division of labour of care between parents are often developed quickly, care-related leave aimed at protecting mothers only will often set them up to be the primary caretaker, which is not in the interest of gender equality. Moreover, the care responsibility can be contrary to the medical needs after birth. While it is often the case that women require some time to recover after birth, postnatal depression at times requires an early return to work and/or avoiding long-term leave.[571] A broad understanding of the biological condition after birth that is legitimately recognised under the Pregnancy Directive should thus not simply consider the need to recover physically but also mentally. Regarding the latter, a more even split of care responsibilities between parents would certainly help. After all, it is only the biological condition that distinguishes mothers that are pregnant or have recently given birth from fathers, not the care responsibility.[572] Including the latter under the scope of maternity leave and then potentially providing additional rights to mothers because of it, also fails to recognise those fathers that indeed take equal amounts of leave and are equally involved with childcare.

The current inconsistencies open the door for national courts to assess leave from a formal rather than a substantive perspective. Disputes around pay under the **UK**'s provisions on shared parental leave demonstrate this. Shared parental leave enables mothers and fathers to share 50 out of 52 weeks of maternity leave between each other. However, fathers (or the other parent) can only take the leave if the mother is entitled to maternity leave and agrees to transfer her maternity leave entitlements to him. Moreover, there are certain conditions regarding length of service that differ from the entitlements under maternity leave and the weekly statutory pay is rather low (the lower of GBP 151.20 or 90 % of the average weekly earnings) while maternity leave entitles mothers to 90 % of their average weekly earnings for the first six weeks.[573] Moreover, it is not uncommon practice for employers to top up the statutory minimum of maternity pay but not the statutory minimum of shared parental leave. From an EU perspective, these leave arrangements are problematic for a number of reasons. First, they do not provide equal access to the leave to both parents. Secondly, the maternity leave itself can hardly be classified as maternity leave within the meaning of EU law. Not only is the leave transferable but it also covers 52 weeks and is thus significantly longer than generally considered necessary for recovery after birth. There is thus little doubt that the leave focuses on childcare in more general terms. Nevertheless, courts have upheld the distinction between both. While the transferable nature of the leave has not been challenged, a number of cases have challenged the difference between maternity pay and shared parental pay. Specifically, the differences in pay were challenged under indirect sex discrimination law, because, although mothers are also able to transform their maternity leave into shared parental leave, they are much more likely to take maternity leave, while the other parent can only take shared parental leave and thus suffers a financial disadvantage. While there is some uncertainty how to approach these issues,[574]

569 Judgment of 12 July 1984, *Hofmann* v *Barmer Ersatzkasse*, C-184/83, ECLI:EU:C:1984:273.

570 McGlynn, C. and Farrelly, C.C. (1999) 'Equal Pay and the "Protection of Women within Family Life"' 24(2) *European Law Review* 202; De la Corte-Rodriguez, M. (2019) *EU Law on Maternity and Other Child-Related Leaves: Impact on Gender Equality* (Kluwer Law International).

571 This was the case in the recent **UK** Employment Tribunal decision *Capita Customer Management* v *Ali* UKEAT/0161/17/BA, 11 April 2018. The father hoped to go on shared parental leave because it was recommended that his wife should return to work following episodes of post-natal depression. However, his employer only offered 2 weeks of fully paid paternity leave while offering 14 weeks of full pay to women on maternity leave. The subsequent shared-parental leave available to fathers and mothers but more likely taken by fathers was paid only according to the statutory minimum.

572 Mulder, J. (2018) 'Promoting substantive gender equality through the law on pregnancy discrimination, maternity and parental leave' 1 *European Equality Law Review* 39.

573 Mitchell, G. (2015) 'Encouraging Fathers to Care: The Children and Family Act 2014 and Shared Parental Leave' 44(1) *Industrial Law Journal* pp. 123, 126-128.

574 See e.g. tribunal decision in *Snell* v *Network Rail* concerning a policy of giving mothers on shared parental leave full pay but paying only statutory minimum pay to partners on the same scheme was found to be indirectly discriminatory.

UK courts have generally rejected any claim of indirect sex discrimination. In *Hextall* v *Chief Constable of Leicester Police,*[575] the Court of Appeal held that it fell under the 'Equality of Terms' (equal pay) provision of the Equality Act 2010. It was thus not possible to pursue a claim of indirect sex discrimination.[576] Moreover, women who are on maternity leave should not be included in the pool of comparators, because they are not comparable. Rather, the comparison should take place between women and men on shared parental leave. Accordingly, a formal distinction between maternity and parental leave was upheld, which seems problematic considering the CJEU case law above and the leave arrangements favouring mothers. They are thus more likely to take the leave even if their income and their partner's income is similar and there is little pressure to allocate leave evenly.

Indirectly or directly promoting mothers' primary care for children then has wide-reaching consequences beyond the actual first block of leave taken. Many Member States report that women specifically suffer disadvantages because of sickness leave they take because of their children's illnesses and parental leave often ends women's equal participation within the labour market or marks the beginning of a part-time career. The CJEU case law does not demonstrate too much awareness of these disadvantages, which are systematic but cannot be based on a specific action or objective indicator. As *Griesmar* and *Leone* demonstrate, legal provisions that nevertheless tried to recognise these additional disadvantages suffered by women, irrespective of any direct sex discrimination or specific disadvantage being demonstrated, have generally been viewed with scepticism. While this is understandable, as they perpetuate stereotypes and exclude fathers in a similar situation, it is less obvious what Member States can indeed do, if they want to somehow compensate for these disadvantages. In **France**, a report on pensions in the civil service identified how reforms progressively removed gendered service credits for women after the CJEU case law without providing anything else in its place.[577] The CJEU case law on positive action also reduced the number of positive action measures in the **German** context. What then remains are actions to facilitate re-entry to employment after parental leave. In Germany the *Perspektive Wiedereinstieg* (perspective on re-entry) action programme tries to facilitate re-entry to the labour market.[578] However, this will not necessarily address all the disadvantages women experience because of assumed or real childcare responsibilities. After all, the assumption that women will take long periods of parental leave and take over most of the childcare responsibilities beyond that also turns them into less attractive applicants that creates further disadvantages for women within the labour market.

6.3 The relevance of indirect sex discrimination within the diversity of employment arrangements

6.3.1 Flexible work arrangements

Modern labour markets have developed many different types of employment and work relationships that are difficult to capture under the scope of employment. While part-time workers differ regarding their contractually agreed working time, there is usually no question about their employment contract and their relationship with the employer. However, national courts and the CJEU alike have struggled with the proper assessment of more flexible work arrangements, such as zero-hour or on-call contracts or activities within

575 **England** and **Wales** Court of Appeal, *Capita Customer Management Ltd* v *Ali* v *Working Families*; *Hextall* v *Chief Constable of Leicestershire Police* v *Working Families* [2019] EWCA Civ 900 (*Capita* v *Ali* concerned a direct sex discrimination claim arising on similar facts and the appeals were heard together).

576 The 'Equality of Terms' claim was defeated by the protection in the Equality Act for terms of work affording special treatment to women in connection with pregnancy or childbirth.

577 France (2019) *Rapport sur les pensions de retraite de la service publique* (Report on pensions in the civil service), p. 95, available at: https://www.performance-publique.budget.gouv.fr/sites/performance_publique/files/farandole/ressources/2020/pap/pdf/jaunes/Jaune2020_pensions.pdf; Council on retirement (COR) (2018) Évolutions et perspectives des retraites en France. *Rapport annuel 2018* (Retirement in France – developments and prospects. Annual Report 2018), available at: https://www.cor-retraites.fr/documents/rapports-du-cor/evolutions-et-perspectives-des-retraites-en-france-5. For a summary of the impact of the reform of the service credit, see Q & A at the General Assembly following the ECJ *Leone* case http://questions.assemblee-nationale.fr/q14/14-62133QE.htm.

578 See https://www.perspektive-wiedereinstieg.de/Navigation/DE/startseite_node.html.

the gig-economy.[579] These arrangements should be distinguished from flexible working arrangements for the benefit of the employee. While the latter usually allows for some flexibility to determine when and where the work is completed in order to accommodate other tasks and responsibilities outside the sphere of work (such as picking children up from school), the overall working time and load usually remains to fixed or is only subject to minor changes.[580] For example, Article 3(1)(f) of Work-life Balance Directive 2019/1158/EU includes the possibility of reducing working hours under the meaning of flexible working arrangements. However, this does not predominantly refer to weekly changes. For example, the **Dutch** law on flexible working arrangements granting a strong right to employees to adjust their working time, provides that employees can only request a new working time adjustment one year after the employer has granted or refused the demand (save for in exceptional circumstances).[581] The specific working time of each week is thus foreseeable unless the worker takes short-term or emergency leave.

Flexible work arrangements for the benefit of the employer, on the other hand, do not guarantee minimum hours of work or pay and thus expose workers to a significant amount of uncertainty. While in turn the worker is able to reject work if they are unavailable, many will be unable to use this right in practice, as they rely on the income. As such, they are likely to face exploitation without a clear indication of their rights. In addition, in many Member States, the worker's status as employee is not certain, which then raises a whole set of difficulties regarding the entitlements of the employee as well as the correct pool of comparators.[582] Even if these flexible workers are protected under EU non-discrimination law, identifying and remedying the disadvantage is difficult when the complaint is directed at the very essence of the contractual agreement itself.

In *Wippel*, the CJEU had little difficulty in considering that a zero-hour contract came under the Equal Treatment Directive 76/207/EEC because the 'contract at issue affects the pursuit of occupational activity by the workers concerned by scheduling their working time according to need' and thus was concerned with working conditions.[583] However, this did not help the complainant much, because the CJEU rejected the comparability of the contractual arrangements with regular part-time and full-time work. Although this reasoning should be criticised,[584] the difficulty with the case was that any recognition of an entitlement to weekly hours or pay corresponding to specific weekly hours would have put the very essence of the contract into question and transformed it into a regular part-time or full-time position. Similarly, temporary contracts cannot have the same protections in terms of dismissal as they then cease to be temporary, unless it can be demonstrated that the non-renewal constitutes sex discrimination.[585] If the existence of a zero-hour contract can be justified as such, it is unlikely that the specific working condition (zero hours) can be challenged and thus changed under the scope of indirect sex discrimination. Specifically, it is unlikely for the change of contract to be deemed acceptable within the scope of objective justification, as it was recognised in *Kachelmann* that employees are not entitled to a unilateral transformation of their employment contract into a different (more beneficial) arrangement.[586] Thus, as long as one considers these flexible work arrangements to be acceptable forms of employment, challenges that go to the core of these contracts (specifically working time) can hardly be addressed under indirect sex discrimination law. The protection thus remains mainly within the scope of Directive 1999/70/EC on fixed-term work.[587]

579 Caracciolo di Torella, E. and McLellan, B. (2018) *Gender equality and the collaborative economy* (European Commission, European network of legal experts in gender equality and non-discrimination).
580 Work-life Balance Directive 2019/1158, Articles 5, 6 and 7.
581 Burri, S.D. (2020) 'Care and the workplace: the Dutch approach to part-time work, flexible working arrangements and leave' in Gelsthorpe, L., Mody, P. and Sloan, B. (eds), *Spaces of Care* (Hart Publishing) pp. 143, 151.
582 Jaehrling, K. and Kalina, T. (2020) '"Grey zones" within dependent employment: formal and informal forms of on-call work in Germany' Vol 26 *Transfer: European Review of Labour and Research*, pp. 1-17.
583 Judgment of 12 October 2004, *Wippel*, C-313/02, ECLI:EU:C:2004:607 paras 29-30.
584 See section 4.2 above.
585 For example, the CJEU held in its judgment of 4 October 2001, *Jimenez Melgar*, C-438/99, ECLI:EU:C:2001:509 that a non-renewal because of the workers pregnancy constituted pregnancy and therefore direct sex discrimination. The need for some legal protection is also recognised within the **UK**, as the Employment Act treats non-renewal of a temporary contract as dismissal.
586 See section 4.4.4 above.
587 Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work, OJ L 175, 10.7.1999, pp. 43-48.

While some Member States have chosen to ban some types of unsecure employment relationships (see e.g. **Austria** and **Ireland** regarding zero-hour contracts), other Member States have welcomed them as innovative approaches that broadly fall within their flexicurity strategies. The flexibility that is required within this economy not only threatens financial security as such, but often disadvantages women. In *Danfoss*, the CJEU already recognised that the requirement to be a flexible worker can constitute a disadvantage for women. If it is true that women are more likely to shoulder most or all domestic care responsibilities, their ability to be flexible will be seriously hampered.[588]

Equal treatment claims are not limited to working time alone. Thus, disadvantages linked to pay, seniority, or promotion could certainly be addressed within its scope as long as a disadvantage can be identified. Whether the indirect sex discrimination can then address these disadvantages depends on the existence of a particular group disadvantage. The identification of such a group disadvantage can be difficult for two reasons. The first difficulty arises from the correct frame of reference. If all workers have the same disadvantageous working arrangements, there is no particular group disadvantage. However, gendered disadvantages can nevertheless be perpetuated. For example, workers on fixed-term contracts may struggle to accumulate sufficient working days with one employer to obtain rights related to parental leave, which is likely to disadvantage women more than men.[589] In order to recognise these related gendered disadvantages as well as the disadvantages within the contract itself, the pool of comparators needs to be broader. While this should not be difficult if there is another group of part-time or full-time workers that falls within the pool of comparators, the CJEU's rejection of comparability in *Wippel* may narrow the frame of reference. The **French** Court of Cassation was confronted with this question, as it was concerned with the illegal renewal of short-term contracts within the postal service. Although the court recognised that the female claimant was actually in a permanent position, it ignored the alleged indirect sex discrimination that referred to the fact that most women were recruited in these short fixed-term contracts while most men were in permanent employment. In doing so, it relied on the Court of Appeal's decision that rejected the claimant's pool of comparators as it included the whole pool of private and public sector short-term contracts. Instead the Court of Appeal only considered a comparison of private law contracts to be appropriate, given that they were concluded under a different legal regime.[590] Other jurisdictions also struggle with the identification of the correct frame of reference. For example, while the **Dutch** Equal Treatment Commission considered part-time workers working less than 12 hours to be entitled to compensation for irregular hours, even if they are especially hired for these kind of hours, it did not consider on-call workers to be entitled to the same compensation because they were able to refuse irregular hours whereas regular workers were not.[591]

Secondly, while the ultimate assessment depends on the situation within specific sectors and undertakings, it is not at all obvious whether these flexible work arrangements are more likely to disadvantage men or women. This again depends on the particular measure and the frame of reference. While the data in some Member States suggests that women are indeed more likely to work within these flexible work arrangements (e.g. **Netherlands**, **Sweden**) the picture is not as certain across all Member States regarding flexibility arrangements other than fixed-term contracts (e.g. **Croatia**, **Finland**, **Sweden**).

6.3.2 Self-employment

The role of employment and work relationships may also differ significantly within the diverse economies of the Member States. A number of Member States indeed observe that there is a significant uptake of

588 Judgment of 17 October 1989, *Handels- og Kontorfunktionærernes Forbund i Danmark* v *Dansk Arbejdsgiverforening for Danfoss*, C-109/88, ECLI:EU:C:1989:383. See discussion in section 4.3.4 above.

589 See regarding the French context: Auzel G., Rance E. and Remay F. (2018) 'Evaluation report on parental leave and its entitlements' (*Mission d'évaluation sur le congé parental d'éducation et de la prestation partagée partagée de l'éducation*) Inspection Générale des Affaires Sociales (General Inspection of Social Affairs) available at: http://www.igas.gouv.fr/IMG/pdf/2018-124R-2.pdf.

590 Court of Cassation No. 13-16936, 22 Oct. 2014.

591 **Dutch** Questionnaire to this report; Equal Treatment Commission, opinion 2012-136: https://mensenrechten.nl/nl/oordeel/2012-136.

self-employment that seems to replace more traditional flexible work arrangements. Within that context, women are much more likely to work as solo entrepreneurs than men. Certainly, self-employment within the gig economy will only increase such effects, especially as it potentially increases the number of quasi-independent workers who work for somebody else on a service contract without their own personnel. Moreover, countries with a majority of micro-enterprises (e.g. with fewer than 10 employees) such as **Estonia** may also reduce the effectiveness of the protection within employment law, as it is more difficult to demonstrate particular disadvantages within very small workforces. Overall, there is a tendency for more and more self-employment in sectors that traditionally employed workers, such as agriculture, and women are especially affected by this development.[592] This then further reduces their social protection in sectors that already suffer from low employment protection and contain many quasi-independent workers.

There are also indications that new forms of self-employment within the gig economy create new forms of indirect sex discrimination, for example regarding the use of algorithms.[593] There is clear indication that algorithms can solidify unconscious biases in society under the disguise of mathematical objectivity. After all, algorithms are only as good as their creators and the information they receive.[594] Unconscious gender biases can be relevant at both stages. For example, if work is allocated depending on ratings that are created by algorithms that use information and feedback given by customers, unconscious gender biases are likely to be carried through the process, will influence the ratings, and thus prevent equal access to work. It has also been argued that women with care responsibilities are often unable to respond flexibly to work demands as they must coordinate this with their care responsibilities. They will thus be unable to work at specific hours that are potentially the most lucrative and demanding hours of the day.[595] The notoriously weak labour law protection within the sector certainly leaves much scope for abuse.

While self-employment itself does not exclude the arrangement from the scope of EU non-discrimination law, the potential of indirect sex discrimination being found is significantly reduced within this context. Although an undertaking's measures, practices or criteria may be easier to challenge if they engage a lot of self-employed people, 'particular group disadvantages' can hardly be demonstrated statistically if there is no proper pool of comparators. Within that context, a qualitative assessment may then be the only viable option.

Beyond the difficulty of establishing a 'particular disadvantage', there may be real difficulties in identifying the duty bearer who is responsible for the unequal treatment or could at least be tasked with restoring equality. This again refers to the correct frame of reference. Within the gig economy, it is not certain who would be the responsible source, as it could be the platform provider as well as the client or user of the service. Within the **UK**, Uber drivers were recognised as workers and thus entitled to some employment protection in relation to the platform provider,[596] however, such a classification still depends on the specific circumstances and thus is not a general judgment on the gig economy as a whole.[597] Many of these workers will be considered as self-employed. For example, in *Yodel Delivery Network*, the CJEU rejected the delivery drivers' status as workers because it neither viewed the independence as purely fictitious nor could identify a relationship of subordination.[598] As such, it raises the question whether there is room to

592 Regarding **France**: Abdelnour, S., Bernard, S. and Gros, J. (2017) 'Genre et travail indépendant. Divisions sexuées et places des femmes dans le non-salariat' 150 *Travail et Emploi* 5, available at: https://dares.travail-emploi.gouv.fr/publications/genre-et-travail-independant.

593 Gerards, J. and Xenidis, R. (2020/forthcoming) *Algorithmic discrimination* (European Commission, European network of legal experts in gender equality and non-discrimination); Xenidis, R., 'Tuning EU Equality Law to Algorithmic Discrimination: Three Pathways to Resilience' *Maastricht Journal of European and Comparative* Law (forthcoming); Burri, S.D. and Heeger-Hertter, S.E. (2018) 'Discriminatie in de platformeconomie juridisch bestrijden: geen eenvoudige zaak' *Ars aequi* 1000.

594 Mayson, S.G. (2019) 'Bias In, Bias Out' 128(8) *The Yale Law Journal*, pp. 2122-2473.

595 Kovacs, E. (2018) 'Gender Equality in Virtual Work I.: Risks' *Hungarian Labour Law E-Journal* (1). pp. 90-102; Burri, S.D. and Heeger-Hertter, S.E. (2018) 'Discriminatie in de platformeconomie juridisch bestrijden: geen eenvoudige zaak' *Ars aequi* 1000.

596 **England** and **Wales** Court of Appeal, *Uber BV v Aslam and others* [2018] EWCA Civ 2748.

597 See regarding Uber, CJEU judgment of 30 December 2017, *Asociación Profesional Elite Taxi*, C-434/15, ECLI:EU:C:2017:981; judgment of 10 April 2018, *Uber France*, C-320/16, ECLI:EU:C:2018:221.

598 Judgment of 22 April 2020, *Yodel Delivery Network*, C-692/19, ECLI:EU:C:2020:288.

broaden the definition of a worker in order to expand workers' protection. Similarly, in *Danosa*,[599] the CJEU held that a member of the company's board of directors must be regarded as having the status of worker for the purposes of the Pregnancy Directive 92/85/EEC only if that activity is carried out, for some time, under the direction or supervision of another body of that company and if, in return for those activities, the board member receives remuneration. Even if Danosa herself is not a 'pregnant worker' within the meaning of Directive 92/85, the fact remains that the removal, on account of pregnancy or essentially on account of pregnancy, of a member of a board of directors who performs duties such as those described in the main proceedings can affect only women and therefore constitutes direct discrimination on grounds of sex, contrary to Council Directive 76/207/EEC on equal treatment (now repealed). In *Allonby*,[600] the CJEU held,

> 'For the purposes of that provision, there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration (see, in relation to free movement of workers, in particular cases Lawrie-Blum, and Martínez Sala).'

Accordingly, many self-employed workers will fall within the meaning of the Recast Directive.[601] The scope of Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity, is thus somewhat narrower than the title suggests.[602]

The question is thus rather if and how the platform provider bears some responsibility towards its (self-employed) workers. It is certainly not clear whether organisations governed by algorithms and customer feedback schemes can address these 'particular disadvantages' easily. While it may be possible to address flexibility criteria that disadvantage women (e.g. because they struggle to respond at certain peak hours), feedback mechanisms by customers are likely to devalue female services, too. These systemic disadvantages based on gender stereotypes and unconscious biases can potentially be intensified in industries that use computerised evaluation systems that have the appearance of objectivity but are indeed susceptible to sexist and biased views. The old case law in *Danfoss* can potentially be helpful here. The CJEU made it explicit that a mobility criterion that is supposed to measure enthusiasm etc. for the work has not been applied properly if it disadvantages women, because it is implausible that an objective application would systematically devalue women's contributions. In a similar vein, one could challenge evaluation systems within the gig economy, if it can be shown that they systematically disadvantage women. However, it is still unclear how that could be done in practice and would impose unreasonable burdens on the individual claimant.

Overall, it remains unclear how to effectively address sex discrimination within self-employment. Some examples can demonstrate the limited engagement with disadvantages experienced by self-employed workers.[603]

A **Maltese** case concerned discrimination against a consultant.[604] The claimant's work as a lawyer was first transformed into a consultant contract because she had to take care of her mother and could thus not work full time. Her contract was then terminated following her pregnancy. While her consultancy contract had many elements of an employment contract, she was deemed to fall outside the scope of

599 Judgment of 11 November 2010, *Danosa*, C-232/09, ECLI:EU:C:2010:674.
600 Judgment of 13 January 2004, *Allonby*, C-256/01, ECLI:EU:C:2004:18, para. 67.
601 Barnard, C. and Blackham, A. (2015) *Self-Employed – The implementation of Directive 2010/41 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity* (European Commission, European network of legal experts in gender equality and non-discrimination).
602 Countouris, N. and Freedland, M. (2012) The Personal Scope of the EU Sex Equality Directives (European Commission, European network of legal experts in gender equality and non-discrimination).
603 Barnard, C. and Blackham, A. (2015) *Self-Employed – The implementation of Directive 2010/41 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity* (European Commission, European network of legal experts in gender equality and non-discrimination).
604 Malta, Civil Court, 6 December 2016, *Dr. Anika Psaila Savona* v *CHI Limited*, ECLI:MT:CIVP:2016:103912.

employment protection and lodged a claim against the company. The civil court subsequently rejected her claim because she was not able to prove that she had been discriminated against.

In a **UK** case, *Bradley* v *London School of English and Foreign Languages Ltd*,[605] a freelance teacher was able to establish a prima facie case of indirect sex discrimination because she was not offered work, due to her inability to arrive at work at 8.45am. Her lack of employment contract was thus not an obstacle. In contrast, however, in *Jivraj v Hashwani,*[606] the UK Supreme Court ruled that arbitrators were not 'employed' for the purposes of the anti-discrimination provisions. Significantly, the requirement to be 'under a contract personally to do work' did not cover independent providers of services who were not in a relationship of subordination with the person who received the services. The extent to which domestic law protects self-employed persons in general is thus uncertain, although some professions are explicitly covered.[607] This highlights the importance of the employee/worker status, which continues to be controversial within UK law.

The **German** Questionnaire to this report states

> 'The recognition of child-raising periods is still a problem within the liberal professions. Some of the professional pension funds offer non-contributory membership for up to three years. As women in the liberal professions normally work part-time after childbirth, the non-contributory membership is no option as it requires full leave. The regular contributions, on the other hand, can hardly be paid when working part-time. Members of the liberal professions can apply for benefits from the statutory pension funds for children born after 1991 when their professional pension fund does not pay for child-raising periods. However, lower courts have excluded the raising of adopted children from the beneficiary regulations of professional pension funds.[608] For a considerable time, German courts have raised doubts as to whether national and European anti-discrimination law can be applied to professional pension funds at all.'[609]

Part-time work is thus not properly recognised and accommodated within these pension funds.

6.3.3 New workplace arrangements

Although flexible work arrangements are often concerned with working time, they can also relate to the place of work or be a combination of the two. For example, the **Dutch** Flexible Working Act allows workers to request an adjustment of working time, working hours and place of work.[610] Working at home or remotely is often hailed as accommodating workers with additional domestic responsibilities that must be completed during the day. For example, it may enable a parent to pick up and supervise their children after school. Remote working in combination with flexibility regarding the exact time work must be completed can then be viewed as an effective way to balance work and domestic responsibilities. To what degree that is indeed realistic has come been put to the test during the current pandemic. With schools and nurseries being closed and working remotely being encouraged whenever possible, many parents have had to work from home while supervising their children. There is clear evidence that much of this additional childcare has been covered by mothers who have then struggled to meet their professional

605 **UK** Employment Appeal Tribunal, 14 May 2018, *Bradley* v *London School of English and Foreign Languages Ltd*, [2018] 5 WLUK 242.
606 **UK** Supreme Court, *Jivraj v Hashwani*, 27 July 2011, [2011] UKSC 40.
607 **UK** Questionnaire to this report.
608 Administrative Court of Frankfurt, judgment of 23 October 2008, 12 K 1948/08F, although applying the German Constitution, the ECHR and Directive 79/7/EEC. In the author's opinion, the Court was mistaken in assuming that this was a question of family protection only and not also one of gender equality.
609 **German** Federal Administrative Court, judgment of 25 July 2007, 6 C 27/06, decided that professional pension funds are not covered by the concept of remuneration as employed in Article 141 EC Treaty or by the scope of application of Directive 2000/78; confirmed by the State Administrative Court of Rhineland Palatinate, judgment of 26 May 2010, 6 A 10320/10.
610 Burri, S.D. (2020) 'Care and the workplace: the Dutch approach to part-time work, flexible working arrangements and leave' in Gelsthorpe, L., Mody, P. and Sloan, B. (eds), *Spaces of Care* (Hart Publishing) pp. 143, 150.

obligations.[611] While the lack of outside childcare and schooling may be a temporary issue, many of the remote working arrangements are likely to stay, as they save employers significant amounts of office space and work processes have been adopted accordingly. The question is whether these arrangements can still become potentially problematic under the scope of indirect sex discrimination.

The ability or requirement to work remotely falls under the scope of working conditions and is thus covered by EU non-discrimination law.[612] Accordingly, equal access and equality of impact must be ensured. A person's concern with one or the other will very much depend on whether they view remote working arrangements positively or negatively. If employees who are willing to work remotely receive additional financial benefits or see other improvements to their working conditions, equal access to the scheme must be ensured. Whether there is indeed equal access will not only depend on the arrangements at work but also on the employees' living conditions. For example, there may not be space for an adequate workplace at home. Additionally, working remotely can also be viewed negatively: it increases household expenses such as heating, electricity, and water usage, and adds additional burdens to the working day, for example, because there is no appropriate workplace available at home or the employee's work is interrupted by children or other dependants. If it is true that women are generally poorer than men as they occupy lower paid work, are more likely to be single parents, and are more likely to bear the majority of domestic responsibilities including care, they will experience more of the potential negative consequences of remote working conditions, as well as difficulties accessing remote working. Moreover, if employers closely monitor the worktime and conduct at home, employees will not reap the benefits from working remotely and will potentially experience some intrusion into their privacy. It is reasonable to assume that working time and conduct is more closely monitored in lower skilled jobs that are more focused on covering certain shifts than on the outcome of particular work processes.

Indirect sex discrimination law could address some of these issues, as it considers the de facto outcomes of the working conditions and thus will be able to consider access to such conditions as well as their consequences. However, the way that remote work transfers working conditions into the home and thus private life may make it difficult to identify a culprit for the inequality or an entity that could restore equality. As such, it will also often be possible to justify 'particular disadvantages' as the very nature of remote working involves working from home, meaning that the conditions in which that take places are not fully the employer's responsibility. Nevertheless, remote working arrangements should be viewed sceptically. Although at times they may help in accommodating different tasks, they also potentially perpetuate gendered work pressures during the working day. In order to recognise these gendered disadvantages under the scope of indirect sex discrimination, private life disadvantages that are the consequence of work-life arrangements need to be recognised as such. While the CJEU has often upheld a separation between the public and private sphere (e.g. *Österreichischer Gewerkschaftsbund (ÖGB)*, *Helmig*),[613] such a distinction is difficult to draw when work is conducted within a private setting. Moreover, indirect sex discrimination may impose duties upon the employer to accommodate the impact in practice of any work rearrangements, including remote working. While it has been suggested that indirect sex discrimination law imposes duties akin to duties of reasonable accommodation, the focus remains on structural change rather than the accommodation of individual needs.[614] Accordingly, the employer could be required to consider any obstacles that women are more likely to experience when working remotely and accommodate them.

611 Georgieva, K., Fabrizio, S., Hoon Lim, C. and Tavares, M. (2020) 'The COVID-19 Gender Gap', *IMF Blog* 21 July 2020, available at: https://blogs.imf.org/2020/07/21/the-covid-19-gender-gap/; Landivar, L., Ruppanner, L., Scarborough, W. and Collins, C. (2020) 'Early signs indicate that COVID-19 is exacerbating gender inequality in the labor force' 6 *Socius: Sociological Research for a Dynamic World* pp.1-3. See section 2 above.

612 Recast Directive 2006/54/EC, Article 14.

613 Judgment of 8 June 2004, Österreichischer Gewerkschaftsbund, C-220/02, ECLI:EU:C:2004:334; judgment of 15 December 1994, *Stadt Lengerich and Others* v *Helmig and Others*, C-399/92, ECLI:EU:C:1994:415. See also sections 4.2 and 4.3.1 above.

614 See section 5.5 above.

6.3.4 Segregated labour market

The discussion on flexible work arrangements already hints at the broader issue of a segregated labour market where women and men are likely to work within different professions. This has been commonly identified in many Member States as one of the main factors contributing to the gender pay gap. Typically, 'female professions' receive lower pay, face less advantageous working conditions and fewer progression opportunities, even if the work is of equal value as that of 'male professions.' The disadvantage can then be compounded by the fact that many 'typically female professions' employ a large number of part-time workers or workers in insecure temporary employment. Such discrepancies are not limited to unskilled or low-skilled professions. Rather, there is indeed evidence that professions are being devalued once women commonly enter them or form most of the workforce, e.g. within the education and healthcare sectors and social services.[615] Segregation can also be observed between public and private employment. For example, in **Finland** it can be observed that women are much more likely to work in public employment. These positions are often less well paid than work of similar value within the private economy, but they often offer more secure employment relationships, progression and pension entitlements, and generous arrangements regarding childcare provisions, flexible work, and family leave. They are thus attractive to female workers who are more likely to be interested in balancing work and family responsibilities. However, taking advantage of these arrangements, such as long-term parental leave and part-time work, then has effects on the gender pay and income gaps, as well as on the pension gap. Moreover, the large number of women in the public sector also makes temporary work arrangements more common, as temporary replacements are needed for maternity cover. These positions are likely to be filled by women, too, which further exacerbates female disadvantages within the labour market.

Addressing inequalities caused by labour market segregation via indirect sex discrimination faces several hurdles. Specifically, the work must be of equal value and the disadvantage must stem from a single source that can address the inequality. The latter requirement will often make it difficult to address unequal treatment and pay within the private labour market. The **Polish** Supreme Court has softened the single source requirement regarding subsidiaries. It specifically held that[616]

> 'in the case of abuse by the parent company of the structure of legal personality, the assessment of violation of the principle of equal treatment in employment may be made by comparing the situation of an employee of the employer being a subsidiary company with the situation of employees of the parent company'.

A recent reference to the CJEU is also concerned with the strictness of the single source requirement. Essentially, the workers employed in the supermarket seek to compare themselves with workers in the distribution centres for the purpose of an equal pay claim. In the words of the **UK** Employment Tribunal,

> 'The female claimants' case is that they are entitled to compare their work to that of male comparators employed by the respondent (or by associate companies of the respondent) at one or more distribution centres ("the comparability issue"). In other words, these comparators are employed at different physical locations from the claimants, and the claimants make so-called "cross-establishment comparisons". Whether this is permissible in these cases is a principal issue.'[617]

615 Levanon, A., England, P. and Allison, P. (2009) 'Occupational Feminization and Pay: Assessing Causal Dynamics Using 1950-2000 U.S. Census Data' 88(2) *Social Forces*, pp. 865-891; Cacouault-Bitaud, M. (2001) 'Is the Feminization of a Profession a Loss of Prestige?' 5(1) *Travail, Genre et Sociétés* 91 (Translated from the French by JPD Systems).

616 **Polish** Supreme Court 18 September 2014 III PK 136/13. See also section 4.3.2 above.

617 CJEU, *Tesco Stores*, C-624/19 (case pending).

Certainly, if such a comparison were ruled out, the relevance of indirect sex discrimination within the segregated labour market would be reduced significantly. Nevertheless, even where a single source is identified, a robust system to assess work of equal value across sectors must be developed.[618]

However, job classification systems are often historic, and have developed based on gendered indicators that fail to recognise de facto requirements of jobs or to fulfil the requirements of a gender-neutral job evaluation scheme.[619] They are thus often based on gender stereotypes. For example, even if one accepts physically strenuous work to have a higher value, it does not explain why physical demands within the healthcare sector do not lead to such roles having a similar value as construction workers. Indeed, **Icelandic** studies suggest that women often do physically more demanding work, which then in turn explains their higher disability rate in older age.[620] Specifically, leaving job classification up to the market and to social partners within collective agreements has to be coupled with a strict assessment of these collective agreements.[621] However, countries with strong protection and recognition of collective freedoms are not likely to carry out such strict assessments. Rather, collective agreements are often not properly scrutinised and even if prima facie cases of indirect sex discrimination are identified, they are likely to be considered justified. The following excerpt from the **German** Questionnaire to this report may serve as an example:

> 'A 2015 case concerned a factory in which shoes were manufactured and in which female production workers had been paid less than male production workers for decades until 31 December 2012. After a landmark decision of the respective State Labour Court of Rhineland-Palatinate,[622] more than 100 female employees successfully claimed the payment of wage differences or received back payments due to a settlement.[623] In 2014, a new remuneration system was introduced which provided for 5 different levels of pay for different working activities. Under the new system, 84 % of the male production employees, but only 28 % of the female production employees, fulfilled the requirements of the advantageous pay level 03 or higher. Nevertheless, the State Labour Court of Rhineland-Palatinate ruled that there was no pay discrimination and thus, no violation of Article 157 TFEU, because the defendant employer had explained in detail how, in a longer process with external experts, the various pay levels were differentiated on the basis of specific activities and work tasks in the manufacturing process without any regard to the sex of the employees involved.[624] The question why only male employees were and are able to perform "heavy and demanding work such as grinding or shoe soling" remained unanswered.'[625]

Generally, social partners are granted a wide margin of appreciation due to their autonomy of collective bargaining.[626] This is the case even if the pay seems arbitrary or unjust[627] and despite the fact that social partners are bound by gender-equality principles. Other Member States follow similarly lenient reasoning

618 See **Norwegian** case 23/2008, about indirect gender discrimination on payment in a municipality. The Tribunal compared women who worked as nurses in the municipality with the positions of managers and technical staff in the same municipality.
619 Commission Staff Working Document Report from the Commission to the Council and the European Parliament on the application of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation SWD(2013) 512 final.
620 **Icelandic** Questionnaire to this report and the discussion in section 4.5 above.
621 This is not limited to job classification systems though, as collective agreements can entail all kind of indirectly discriminatory measures. See **Slovakian** Questionnaire to this report.
622 State Labour Court of Rhineland-Palatinate, judgment of 14 August 2014, 5 Sa 509/13.
623 See Markard, N. (2019) 'Das Gebot der Entgeltgleichheit: verfassungsrechtliche Perspektiven' (The obligation to pay equality: perspectives from constitutional law), *Juristen Zeitung* 74(11), pp. 534-542 (536).
624 State Labour Court of Rhineland-Palatinate, judgment of 11 October 2018, 5 Sa 455/15.
625 Markard, N. (2019) 'Das Gebot der Entgeltgleichheit: verfassungsrechtliche Perspektiven' (The obligation to pay equality: perspectives from constitutional law), *Juristen Zeitung* 74(11), pp. 534-542.
626 Federal Labour Court, judgment of 17 December 2009, 6 AZR 665/08.
627 Federal Labour Court, judgment of 19 January 2011, 3 AZR 29/09.

regarding collective agreements.[628] While the CJEU early on rejected the suggestion that two separate collective agreements can exclude the application of indirect sex discrimination law,[629] it seemingly softened its position in later cases. First, it recognised that a national court may take (local) collective bargaining into account 'in its assessment of whether differences between the average pay of two groups of workers are due to objective factors unrelated to any discrimination on grounds of sex.'[630] Secondly, it has accepted concerns regarding social peace as a legitimate aim.[631]

The relevance of collective agreements is also recognised within the **French** Questionnaire to this report, as the expert states:

> 'The most interesting avenue for transformative case law on indirect discrimination will probably be linked to revamping how collective bargaining agreements can perpetuate forms of indirect sex discrimination:[632] a sex segregated view of collective labour rights (a silo reasoning of equal treatment within each sector or profession), has perpetuated, voluntarily or not, disfavourable grading systems in female dominated professions. Current reforms for budgetary reasons of apparently neutral statutory rules on social benefits (unemployment and retirement)[633] or uniform employer ranking systems for career advancement[634] can also produce a particular disadvantage with regard to women or men depending on the profession. Additionally, a uniform blanket regulation of salaried permanent employment (ignoring the increased use of temporary work, subcontracting and self-employment,[635] teleworking by women and men) does not always incorporate multiple sources of disadvantages based on gender that some groups face. Moreover, the increasing use of algorithms, seen as apparently neutral tools, can be construed as instruments which can entail indirect sex discrimination, as studies show.'[636]

Within the **Netherlands**, additional difficulties arise regarding part-time domestic workers, as they are subject to exceptions regarding the application of labour law (concerning pay during illness and

628 See e.g. **Ireland**, *Flynn* v *Primark* [1996] E.L.R. 78; [1997] E.L.R. 218; [1998] E.L.R. 94; [1999] E.L.R. 89; **Finland** with the exception of Labour Court case TT:1998-34 concerned with the calculation of pay bonuses on the basis of experience, and all 'lawful absences from work' not exceeding 30 days were to be counted as time to be taken into account in the calculation; **Norwegian** Labour Court judgment in Case ARD-2013-11 returned the issue to the social partners. However, the **Dutch** courts demonstrate a more robust scrutiny. While the Amsterdam Court (31-8-2006, ECLI:NL:GHAMS:2006:AZ0535) ruled that the Court should only reservedly test the distinctions the social partners had made in their regulation, the Hoge Raad (Supreme Court) (HR 18 December 2015, ECLI:NL:HR:2015:3628, ECLI:NL:PHR:2015:1970 JAR 2016/41) ruled that, even when the distinction under discussion has been made in a collective agreement between social partners, the Judge should not hold back in judging the distinction.

629 Judgment of 27 June 1990, *Kowalska*, C-33/89, ECLI:EU:C:1990:265; judgment of 27 October 1993, *Enderby* v *Frenchay Health Authority and Secretary of State for Health*, C-127/92, ECLI:EU:C:1993:859.

630 Judgment of 31 May 1995, *Specialarbejderforbundet i Danmark (Royal Copenhagen)* v *Dansk Industri,* C-400/93, ECLI:EU:C:1995:155.

631 Judgment of 28 February 2013, *Kenny and Others*, C-427/11, ECLI:EU:C:2013:122.

632 Grésy B., Becker, M. (2017) 'Guide fondé sur la méthodologie issue des travaux du groupe paritaire sur les classifications' (Guide based on the methodology derived from study groups on the promotion of equality in grading systems within collective bargaining) available at: https://www.egalite-femmes-hommes.gouv.fr/wp-content/uploads/2017/05/GUIDE_EGALITE_SYSTEMES_DE_CLASSIFICATIONS-V2.pdf.

633 Caihol, A. (2019) 'Les femmes premières victimes de la réforme de l'assurance chômage' *Libération* 18 July 2019 available at: https://www.liberation.fr/france/2019/07/18/les-femmes-premieres-victimes-de-la-reforme-de-l-assurance-chomage_1740502. Lecoq, T. (2019) 'Devinez qui pâtira de la réforme de l'assurance chômage' *Slate* available at: http://www.slate.fr/story/183627/inegalites-salariales-femmes-hommes-reforme-assurance-chomage-precarisation.

634 Grésy, B., Lebert, S. (2019) 'Egalité entre les femmes et les hommes dans les procédures RH : Le réflexe égalité à chaque étape' (Equality between women and men in HR processes: the equality reflex at each stage) available at: https://www.egalite-femmes-hommes.gouv.fr/wp-content/uploads/2019/03/Version-finale-RAPPORT-Egalite-dans-les-procedures-RH.pdf.

635 Observatoire du traveil indépendant, list of publications: https://www.travailindependant.org/rapport-sur-la-protection-sociale-des-travailleurs-independants/.

636 Mercat-Bruns, M. (ed.) (2020) *Nouveaux modes de détection et de prévention de la discrimination et accès au droit: action de groupe et discrimination systémique; algorithmes et préjugés; réseaux sociaux et harcèlement sexuel* (New modes of detection and prevention of discrimination and access to justice: group action and systemic discrimination; algorithms and bias; social networks and sexual harassment) (Société de législation comparée, Trans Europe Expert).

dismissal) and social security law.[637] These exceptions also affect 'Alpha-helpers' (domestic care workers who are managed by a home-care organisation, but are (part-time) employed by the private persons they care for). Care workers who are paid on the basis of a personal budget, which is granted to a person with a disability, are also subject to this legislation. Since there is no doubt that the majority of these workers are female, this is an obvious case of indirect sex discrimination. In fact, their exclusion from certain entitlements exacerbates their vulnerable position, as people in the care sectors commonly face physically extremely strenuous work, for low pay and with little employment protection. The exception from dismissal protection is justified as follows.

> 'The preventive test will be required for everyone who is employed on the basis of an employment contract, with the exception of directors of a Ltd Company or a foreign company and the employee who, generally, works less than four days a week as domestic worker for a private household. Approval from the UWV is at the present time not required for this category of workers. The exception for domestic workers is part of the *Regeling dienstverlening aan huis* [Regulation on domestic services] and is meant to avoid discouraging the hiring of domestic workers by private households.'[638]

Unsurprisingly, this approach has been heavily criticised within the literature, as it is not obvious how this indirect discrimination could be justified.[639]

637 **Netherlands** Civil Code, Articles 7:629(2), 7:655(4) and 7:671(1)(d); Work and Care Act, Articles 3:17 and 3:18; Unemployment Insurance Act (WW), Article 6(1)(c); Sickness Benefit Act (ZW), Article 6(1)(c); Disability Insurance Act (WAO), Article 6(1)(c); and Work and Income (Capacity for Work) Act (WIA), Article 8. These specific regulations together are called the 'Regulations on domestic services' (*Dienstverlening aan huis*), but in fact are not one set of regulations, but different exemptions in different laws.

638 *Kamerstukken* (parliamentary report) 2013-2014. 33 81881, No. 3, p. 27.

639 Cremers-Hartman, E. and Bijleveld, L.W. (2010) *Een baan als alle andere?! De rechtspositie van deeltijd huishoudelijk personeel* (A job like all others?! The legal position of part-time household workers) Vereniging voor Vrouw en Recht, Clara Wichmann. See also CJEU pending case, *Tesorería General de la Seguridad Social*, C-389/20 dealing with a similar issue.

7 Concluding remarks

The report discussed the concept of indirect sex discrimination considering CJEU and national courts' approaches and their potential to address systemic or structural gender inequality within the current socioeconomic environment and the ever-changing labour markets of the Member States. To do so, the report was divided into several parts. It began by briefly exploring what has been identified as structural or systemic gender inequality in the Member States (2). It then considered some of the theoretical foundations for the analysis of gender disadvantages and to what extent EU non-discrimination law and, in particular, the concept of indirect sex discrimination, can address these disadvantages (3). The report then considered the current interpretation and application of EU indirect sex discrimination law within the case law of the CJEU and the Member States (4), focused on specific aspects of the concept that are currently underdeveloped to identify gaps, uncertainties and limits within the current framework (5), and considered the potential, relevance and effect of the concept of indirect sex discrimination given common gender inequalities within the rapidly changing labour markets of the Member States (6). Alongside classic gendered differences regarding the uptake of part-time work and parental leave, the final section of the report focused on common developments in the casualisation of work from the perspective of indirect sex discrimination law.

Throughout the report indirect sex discrimination has been considered from two angles: how the concept of indirect sex discrimination and its requirements are conceived by the CJEU, and the way the concept is applied by the Member States. Rather than providing an exhaustive picture of the concept's application across the Member States, the report highlights interesting approaches and specific difficulties to illustrate the practical use and various challenges of the concept of indirect sex discrimination.

7.1 Potential and limits of indirect sex discriminaton law

The report has highlighted the rich and well-developed concept of indirect sex discrimination, which clearly constitutes one of the cornerstones of EU non-discrimination law. While the CJEU case law was not discussed exhaustively, the report has analysed various aspects of the concept and the CJEU engagement with it, as well as aspects that are currently underdeveloped or limit the concept's potential. Indirect sex discrimination law focuses on outcomes and is thus able to detect and challenge measures, criteria and practices that systematically disadvantage women within current gendered structures of inequality. As such, indirect sex discrimination could be a great vehicle for structural, systemic and institutional change. However, the concept is often poorly understood or ignored in the Member States, taking a backseat to engagements with claims of direct sex discrimination. While 'particular disadvantages' as addressed by indirect sex discrimination law should be common within socioeconomic environments that systematically and structurally suffer from deep-rooted gender inequality, few cases on indirect sex discrimination law are actually considered by the courts and even fewer are successful. It thus seems fair to suggest that despite its long history, the potential of indirect sex discrimination to foster substantive gender equality has not yet been realised. The reasons for that are complex and range from different socioeconomic, cultural, and historical factors within the Member States – some of which limit the relevance of EU non-discrimination law overall – to structural limitations within the concept itself.

The analysis in this report has mainly focused on the concept's structural limitations. Specifically, it discussed what limitations are inherent to the concept and what restrictions could be overcome by consistent, coherent and rigorous application of the concept itself. To recapitulate, multiple theoretical foundations can be identified as underpinning the scope of EU indirect sex discrimination law. The CJEU's emphasis that EU non-discrimination law focuses on substantive rather than formal equality stressed the need to consider structural gender inequality and disadvantages. As the report has shown, indirect sex discrimination can expose some of the structural inequalities and at times can impose duties to reconsider organisational structures to address systemic inequalities. This is most evident in the CJEU case law on criteria that are gendered, such as part-time work or parental leave. How systemic disadvantages can

be addressed beyond that is somewhat less certain. However, even a rigorous application of indirect sex discrimination law would be unable to achieve gender equality by itself, let alone economic equality in the broader sense.

A successful claim of discrimination can also have undesirable consequences. Structures may indeed be challenged if they exclude women in specific situations (e.g. single parents) and thus impose duties akin to duties of reasonable accommodation. However, EU non-discrimination law does not provide any minimum protection. There is thus a real danger of levelling down. Most commonly, this will happen if the access to a special benefit is broadened and thus deemed unaffordable or undesirable to be retained. While this is probably deemed acceptable if it simply reduces the unreasonably high benefits of some, it is perhaps more problematic if it reduces benefits of the generally vulnerable. Cases such as *Griesmar* and *Leone* have the potential to reduce women's entitlement to benefits that are intended to compensate them for disadvantages suffered during their career. In the UK, some companies have chosen to reduce their benefits for mothers on shared parental leave, after their male colleagues successfully claimed equal access to the same pay. These cases show that EU non-discrimination law that focuses on comparative disadvantages cannot prevent these undesirable outcomes alone. Instead, special rights have to be ensured.[640]

While some have argued that non-discrimination law is focused on the protection of disadvantaged groups and is thus essentially asymmetrical, even if it generally takes a symmetric approach by reference to a protected characteristic in neutral terms (i.e. protects from sex discrimination rather than women from discrimination),[641] the EU concept of indirect sex discrimination does not impose duties upon the duty bearer to adopt asymmetrical measures for the benefit of those who are disadvantaged. Rather, the focus on pools of comparators to identify the 'particular disadvantage' focuses on comparative disadvantages only, rather than substantive or minimum rights. Within this lies both the concept's strength but also its limitation. On the one hand, the comparative disadvantage can expose gendered vulnerabilities. The lack of a minimum standard then prevents wider justification of their application by reference to a general lack of financial resources. The point is not that women are entitled to certain minimum substantive goods, but that they should have equal access to them. However, this also demonstrates the concept's limitations. After all, equal access is not always sufficient to ensure minimum living standards. Indirect sex discrimination therefore cannot replace substantive social welfare norms or positive action. However, a combined qualitative and statistical assessment to identify 'particular disadvantages' can invite duties akin to reasonable accommodations, although its focus will be on structural change and not individual needs.[642] Gendered intersectional disadvantages can be considered under the scope of indirect sex discrimination, as a 'particular disadvantage' does not need to disadvantage all or even the majority of members of the disadvantaged group.[643] The 'particular disadvantage' can also potentially be addressed, even if the disadvantaged individual does not belong to the disadvantaged group.[644] All these examples demonstrate the potential role of indirect sex discrimination law to address systemic or structural gender inequality.

Whether CJEU case law supports the proposed interpretation of indirect sex discrimination law is not always clear, as significant uncertainties regarding the proper interpretation of the concept remain. The case law is casuistic and not always consistent, as much of the scope addressed depends on the national courts' framing of the question and many cases fail to provide proper guidance that national courts can apply consistently. While de facto discriminatory effects are indeed recognised, there are a number of requirements that potentially reduce the effectiveness of indirect discrimination law. This mostly relates to the uncertainties within the CJEU case law regarding the way disadvantages are identified and appreciated, and the way the frame of reference is determined for the purpose of identifying a

640 See sections 5.5 and 4.5 above.
641 See section 3.2 above.
642 See section 5.5 above.
643 See section 5.4 above.
644 See section 5.3 above.

comparative disadvantage. Depending on the way both issues are approached, indirect sex discrimination law's potential to address structural disadvantages can be narrow or broad. There are also inconsistencies regarding the proper distinction of direct and indirect sex discrimination and conflicting approaches towards comparability that give national courts significant leeway to adopt their own approaches, which may or may not address structural gender inequality more effectively.

7.2 The meaning and scope of recognised disadvantages

Whether a specific treatment is considered a disadvantage often depends on the framing of the issue and whether working conditions are considered separately or jointly.[645] While this has been litigated with a predominant focus on different aspects of pay, other working conditions could pose similar problems. For example, as the discussion above demonstrates, an entitlement or obligation to work remotely can be viewed as an advantage as well as a disadvantage. Whether an employment practice constitutes equal treatment or poses a disadvantage for some groups of employees thus needs to be evaluated considering the wider context within which work takes place. A strict separation of private and professional life, only considering the latter, makes little sense if we recognise that many of the structural disadvantages experienced by women have their origin at least partly in their private life. A separate consideration of working conditions without considering the broader context of life then obscures the existing disadvantages that can be experienced. New working arrangements require a substantive assessment of disadvantages to clearly ascertain how measures, criteria and policies disadvantage or advantage groups of workers. As discussed in *Helmig* in respect of the overtime pay of part-time workers, the CJEU has so far not recognised how private life arrangements, conditions and responsibilities can influence the way employment arrangements are perceived and deemed as burdensome.[646] However, this will become ever more important if our workplace arrangements change dramatically to include more remote working and work at flexible times. Just as the impact of the total number of regular working hours or overtime worked can be different for full and part-time workers with additional domestic care responsibilities (contrary to what was held in *Helmig*),[647] working remotely implies different values and benefits depending on the worker's broader living conditions.

7.3 The correct frame of reference

Identifying the correct pool of comparators to demonstrate a 'particular disadvantage' can create various difficulties as the CJEU favours an individual assessment over a collective assessment of the disadvantages. The court's approach appears to be something of a contradiction: it recognises that indirect sex discrimination law focuses on outcomes with reference to group disadvantages to establish 'particular disadvantages' that are the consequence of structural inequalities, but it does not accept a collective assessment that simply points at unequal outcomes overall, even if only within one source. Accordingly, it is usually insufficient to demonstrate that the pay system as a whole works to the disadvantage of women as accepted in *Rummler*. Rather, the principle of equal pay has to be applied to each aspect of remuneration separately.[648] In some cases, this can be rather burdensome or even impossible. The separate consideration of the individual criteria can also mask how their combined interaction has detrimental effects that are worse than the impact of each individual element. The question is then whether package deals are preferential. Certainly, they, too, can bring disadvantages. Either way, an in-depth proportionality assessment within the scope of the objective justification will be difficult to conduct if the de facto consequences of the employment practices are not assessed coherently. A collective approach will often more easily reveal systematic disadvantages that are inherent in the system and thus reveal its real rather than foreseeable or intended consequences. Under the current approach, such

645 See section 4.3.1 above.
646 See the discussion on *Helmig* in sections 4.3.1 and 6.3.3 above.
647 See section 4.3.1 above.
648 See section 4.3.3 above.

evidence seems to shift the burden of proof only if the whole system lacks transparency. It is then up to the employer to demonstrate that the system is not discriminatory.[649]

Focusing on individual assessments rather than collective outcomes seems particularly problematic within the context of recruitment and promotion procedures. A collective approach can demonstrate the famous 'glass ceiling' (the way women are systematically disadvantaged when it comes to promotions and recruitment procedures, especially regarding access to senior management positions), in a way that an individual assessment of the promotion and recruitment criteria cannot. Specifically, within individual hiring or promotion procedures, many qualified candidates will have to be disappointed and there will be insufficient statistical data to reveal specific disadvantages. However, if the processes systematically disadvantage women, gender biases are likely to play a part although they may not be overt or easy to pinpoint. While such cases may also be addressed under the scope of direct sex discrimination, a collective approach would enable indirect sex discrimination law to be a powerful tool to address these gender biases. Accordingly, it is suggested that a broader consideration of collective outcomes could foster equal access and opportunities more effectively. After all, it is often difficult to identify a specific discriminatory measure, but the outcomes nevertheless suggest some sort of structural inequality or bias.

To reveal systemic disadvantages, it might be reasonable to consider sector-wide data if they correspond with the data from the undertaking in question. Such an approach may however be challenged by the single source requirement. As we have seen above,[650] strict adherence to the requirement will exclude many atypical work arrangements (e.g. agency work) from the scope of the consideration. However, a narrow reading of the CJEU's case law on the single source requirement could suggest the need to identify a body that can restore equality only. Such a body will often exist as individual employees can indeed address the inequality in their own undertaking, even if sector-wide data is used to demonstrate the disadvantages. This approach seems to be supported by recent CJEU case law that recognises how claimants may be deprived of their rights if the requirement to refer to relevant statistics is applied too strictly and thus considered it sufficient to refer to general statistical data, if data on the specific sector or undertaking is not available.[651] While the case concerned discrimination against part-time workers and thus practices that are generally recognised to disadvantage women, a general relaxation would certainly allow for a more holistic consideration of systemic disadvantages. The possibility of a qualitative assessment and the consideration of hypothetical situations to establish a 'particular disadvantage', now recognised within the current definition of indirect sex discrimination, can also be used more effectively to consider systemic disadvantages beyond the narrow scope that often hinders the recognition of disadvantages within the segregated labour market and the new economies.

The collective dimension could also be considered more fully within the procedure itself. While the focus on outcomes for groups within the scope of indirect sex discrimination does capture some of the structural disadvantages, the predominantly individualistic claim procedures dominant within most Member States and a limited frame of reference will often leave systemic disadvantages undetected or difficult to challenge. In that context it may be useful to strengthen the use of class action within the Member States, to separate the potential claims from the responsibility of and burden on the individual, and to encourage strategic litigation.[652] The **French** expert notes, regarding the 2016 French law on collective redress:

> 'A class action suit (called group action) can be introduced in discrimination cases (all types: employment, goods and services, administrative claims). It is a very useful avenue to uncover

649 Judgment of 17 October 1989, *Handels- og Kontorfunktionærernes Forbund i Danmark* v *Dansk Arbejdsgiverforening* for *Danfoss*, C-109/88, ECLI:EU:C:1989:383; judgment of 30 March 2000, *JämO*, C-236/98, ECLI:EU:C:2000:173.

650 See section 4.3.2 above.

651 Judgment of 3 October 2019, *Schuch-Ghannadan*, C-274/18, ECLI:EU:C:2019:828.

652 Burri, S., Senden, L. and Timmer, A. (2020) *A comparative analysis of gender equality law in Europe 2019 – The 28 EU Member States, Albania, North Macedonia, Iceland, Liechtenstein, Montenegro, Norway, Serbia and Turkey compared* (European Commission, European network of legal experts in gender equality and non-discrimination) p. 141.

> indirect sex discrimination because of its collective nature: it can be invoked "when several people placed in a similar situation suffer a harm caused by the same person, due to a common cause, a violation of the same nature whether legal or contractual nature, a group action can be introduced."[653] However this commonality requirement to frame the issue of discrimination in the group action framework based on a collective issue (not a class certification requirement though) is a bit narrow because it focuses more on a quantitative view of direct and indirect discrimination (aggregated action) rather than the systemic nature of direct and indirect sex discrimination based on group disadvantage and unequal opportunities.'[654]

However, systemic disadvantages cannot be fully challenged under the concept of indirect sex discrimination law. After all, within a highly segregated labour market it will be difficult to challenge employer practices because working conditions in a different sector are more beneficial, even if the work is of equal value. Non-discrimination law does not guarantee access to specific or even minimum benefits but focuses on comparative disadvantage. While a comparative disadvantage may be detectable by comparing different sectors and can demonstrate how work contributions are recognised differently depending on whether something is typical female or male work, this does not imply that private employers can be required to level up the pay to restore equality in comparison with other sectors. Even if such an approach could be accepted in principle, employers would often be able to justify their employment practices by reference to sector specific conditions. For example, the care sector is notoriously underfunded. While the fact that women predominantly work within this sector may have led to the devaluation of the work, as female work contributions are often not fully recognised, one may not consider that to be the responsibility of the employer. As new types of employment and work within the gig economy further challenge the dichotomy of employer-employee, claims against individual employers will become even more difficult. Such systemic inequalities will thus have to be addressed on the institutional level, considering, for example, sector specific minimum wages, limits on the casualisation of work and protection of quasi-independent workers.

7.4 Demonstrating a 'particular disadvantage'

Once the correct pool of comparators is identified, the 'particular disadvantage' has to be demonstrated. Most case law within the Member States and CJEU focuses on statistical evidence. While the CJEU has provided some guidance on the statistical significance of the data that can be used, it has de facto left much discretion to the Member States to determine their approach towards statistical evidence. However, recent developments suggest that the statistical evidence loses its importance as the requirement to refer to relevant statistics may deprive claimants of their rights.[655] Specifically, the court has rejected the argument that the claimant needs to provide robust statistical data, if the claimant has limited or no access to the data and statistical facts, especially if the case is concerned with discrimination relating to part-time work or parental responsibilities.[656] In line with this development, the equality directives now define indirect discrimination with reference to a 'particular disadvantage' not a 'substantially higher proportion' of men or women being disadvantaged.[657]

This development elevates the importance of qualitative arguments to demonstrate the particular disadvantage. This creates new uncertainties as Member States and the CJEU have limited experience with qualitative assessments within the scope of indirect sex discrimination law. For example, it is unclear

653 **France**, Act No. 2016-1547 of 18 November 2016 on the modernisation of justice (*Loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIe siècle*), Article 6.
654 Decision of the Defender of Rights, (Défenseur des droits), No. 2019-108, 19 April 2019, p. 14.
655 Judgment of 3 October 2019, *Schuch-Ghannadan*, C-274/18, ECLI:EU:C:2019:828.
656 Judgment of 3 October 2019, *Schuch-Ghannadan*, C-274/18, ECLI:EU:C:2019:828; as well as the previous judgment of 26 September 2000, *Kachelmann*, C-322/98, ECLI:EU:C:2000:495, para 24, where the Court held that it was 'common ground that in Germany part-time workers are far more likely to be women than men.' Judgment of 17 October 1989, *Handels- og Kontorfunktionærernes Forbund i Danmark* v *Dansk Arbejdsgiverforening* for *Danfoss*, C-109/88, ECLI:EU:C:1989:383.
657 For the former definition see for example Article 2(2) Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex OJ L 14, 20.1.1998, pp. 6-8.

to what degree qualitative arguments can contradict or challenge statistical findings and how to prevent the reinforcement of gender stereotypes within the qualitative assessment. Some European guidance could encourage the courts to explore these arguments more fully.

7.5 A combined qualitative and quantitative assessment

The report suggests that a qualitative assessment is most effective if it takes into account wider statistical evidence to assess the apparent neutrality of the challenged measure. Statistics are then not used to demonstrate the unequal results within the undertaking as such, but to consider how these measures systematically disadvantage women, given the wider social context of structural gender inequality. For example, it has been recognised that practices that disadvantage single parents constitute a particular disadvantage if more women than men are single parents, even if only few single parents are employed. Similarly, parental leave was identified as a gendered criterion, given that it is mostly women who take up parental leave.[658] Such an argumentation seems to combine statistical as well as qualitative arguments and can potentially broaden the scope, as it would allow the recognition of gendered criteria (such as parental leave) with reference to wider statistical evidence without the need to consider specific statistics concerned with the precise frame of reference. This reasoning seems uncontroversial. Criteria that are so clearly gendered given structural gender inequality within wider society should be suspect per se and irrespective of the statistical evidence within the specific pool of comparators. Beyond that, there is little evidence of quantitative reasoning within the CJEU and national case law. The scope for qualitative reasoning therefore seems to be limited to specific circumstances that require a detailed assessment of the measure in question to identify its de facto impact on different groups within society, while still assessing the gender disparity within these groups in more general terms. However, qualitative assessments that combine quantitative and qualitative data can go beyond the recognition of clearly gendered criteria and assess the neutrality of criteria that are not prima facie gendered. For example, wider qualitative and quantitative data can show how unconscious biases turn seemingly neutral evaluation measurements such as seniority, experience, or merit, into criteria that systematically work to the disadvantage of women in the workplace, because their seniority, experience and merit are not fully or equally recognised. If employed that way, the qualitative assessment could be a powerful tool to consider de facto disadvantages within the workplace. Unfortunately, the CJEU and most national courts have yet to explore the potential application of qualitative assessments.

7.5.1 Gender as a primary focus of indirect sex discrimination

The recognition of wider systemic gender inequality within the scope of indirect sex discrimination further encourages a focus on gender rather than sex. To what extent gender rather than sex is recognised within the current EU legal framework of non-discrimination law is not entirely clear. It is clear that not all gender non-conformist behaviour is covered by sex discrimination.[659] However, there are good reasons to include men that pick up 'typically' female responsibilities and gender roles under the protection of indirect sex discrimination. After all, men should be encouraged to take up domestic care responsibilities and should not be in a worse situation than women once they do. These concerns have been addressed in several ways. First, some Member States and the EU legal framework have identified specific gendered criteria and prohibited discrimination based on them directly, namely discrimination based on part-time work and parental leave. This can address the most obvious forms of indirect sex discrimination. More generally, we could consider gender roles within the scope of indirect sex discrimination in that men who fulfil typical female gender roles may be protected if the role creates a particular disadvantage for women. It has been suggested that such a case could be one of discrimination by association. However, if these cases indeed involve a different treatment of men and women because of gender stereotypes, they may be more closely related to direct sex discrimination. Finally, one may consider the de facto (or perceived) identity

658 See section 4.3.4, above.
659 See for example the exclusion of sexual orientation from the scope of sex discrimination; Judgment of 17 February 1998, *Grant*, C-249/96, ECLI:EU:C:1998:63.

of the disadvantaged person and consider them together with the disadvantaged group. The latter would require an objective assessment of the 'particular disadvantage' independent from the claimants' sex, and then include all under the protection that experience that disadvantage, whether part of, or suffering alongside, the disadvantaged group. This approach would have the benefit that the dynamic nature of indirect sex discrimination law is kept intact, as in principle it can cover all kinds of disadvantages, while separating it from the sex itself and instead considering several gendered power structures that are the cause of the vulnerability. A combined, qualitative and quantitative reasoning may further broaden the scope of such considerations, as it can go beyond the specific frame of reference.

7.5.2 Intersectionality

Intersectional disadvantages can also be revealed more easily if we focus on systemic disadvantages more broadly. While the CJEU has mostly ignored the gendered intersectional disadvantages within the relevant case law, an engagement with combined qualitative and quantitative arguments that consider systemic disadvantages could explicitly reveal the common nature of intersectional disadvantages and the ways in which they systematically reinforce gender inequality. The experience in some Member States could be further used to enhance the protection of those suffering disadvantages on the intersection.[660] Specifically, this would enhance protection, as EU non-discrimination law provides a hierarchy of protected characteristics, with the directives on race covering the largest material scope, followed by sex.

7.5.3 Reasonable accommodation

The inclusion of qualitative and quantitative reasoning for the establishment of a prima facie case of indirect sex discrimination brings the concept closer to duties akin to that of reasonable accommodation. The focus however is on structural and systemic disadvantages, not on individual needs. The potential accommodation within indirect sex discrimination must be focused on groups not individuals, even if it de facto only benefits one or few individuals. Moreover, it is constructed in the negative. In the absence of any justification, an employer should not continue a practice that creates a disadvantage. Ideally it then is replaced by a different measure that does not carry the same or a different 'particular disadvantage'. While this can potentially burden the employer, the burden predominantly focuses on the need for the restructuring of their work processes, treatment and pay. On the other hand, there is no positive duty to provide specific accommodating measures to vulnerable groups, even if the lack thereof can impede access to employment. However, if it is correct that a combination of qualitative and quantitative reasoning for the identification of a particular disadvantage broadens the scope of prima facie cases of indirect sex discrimination, more practices will require revision, reconstruction or justification. This should lead to work structures that are more aware of the needs of vulnerable groups and accommodate access to employment and opportunities within it.

7.5.4 Maternity and parental leave discrimination

Finally, a focus on systemic disadvantages could also encourage a reconsideration of the way different forms of leave are granted and encourage a stricter distinction between maternity and parental leave, with the former solely being concerned with the physical recovery after birth and breastfeeding. Specifically, it should be recognised that the substantive rights provided by the Pregnancy Directive or Work-life Balance Directive do not limit the application of indirect sex discrimination law unless explicitly regulated within it. After all, simply because the Parental Leave Directive does not guarantee a right to flexible working time or change of working time patterns,[661] it does not mean that a refusal of such a request cannot constitute a particular disadvantage.

660 See comments in the **Norwegian** Questionnaire to this report.
661 As in judgment of 18 September 2019, *Ortiz Mesonero*, C-366/18, ECLI:EU:C:2019:757.

Accordingly, the scope of indirect sex discrimination law can be enhanced and potentially freed from many of its limitations by reference to a combined qualitative and quantitative reasoning that does not simply focus on statistical disadvantages within the precise pool of comparators but looks at systemic disadvantages on a broader scale. This is not to say that statistical evidence focused on a narrow pool of comparators is not useful. To the contrary, this evidence can reveal unexpected and underassessed disadvantages. However, for EU indirect sex discrimination law to effectively tackle the diverse multi-layered reality of systemic and structural gender disadvantages, multiple perspectives need to be adopted. For example, viewing a well-supported full-time worker as the norm can be problematic if we consider how power relations within families and the wider society encourage women to take up most of the domestic responsibilities, and exposes the assumption of the typical versus the atypical (e.g. part-time) worker as nothing other than a reinforcement of the male norm. While there is little experience with such an approach at the EU or national level, the acceptance of qualitative arguments should allow for the development of such reasoning and further (legislative) guidance could potentially enhance the focus on such reasoning. The question then is whether there should be a hierarchy of reasonings. A statistical reasoning could, for example, trump a qualitative reasoning, as it demonstrates de facto differences without presumptions and stereotypes being taken into account. However, a combined qualitative and quantitative reasoning that suggests different outcomes to statistical evidence should not be dismissed too quickly. After all, simply because a 'particular disadvantage' is not obvious within the specific undertaking given the available statistical evidence, it does not mean that it does not exist and potentially impedes access to employment.

7.6 Objective justification

The proposed broadening of the potential frame of reference also has implications for the objective justification. As more cases will be able to establish a prima facie case of indirect sex discrimination, objective justification will have to be considered more broadly. A more detailed engagement with potential objective justifications will be required, specifically if the 'particular disadvantage' is demonstrated by reference to systemic qualitative and quantitative data, as that will often challenge the very nature of the measures, criteria and practices used, rather than simply their outcome in specific circumstances. Given that national courts currently enjoy significant discretion in that regard, without much specific guidance by the CJEU, additional guidelines regarding the precise scope of the objective justification maybe useful. The objective justification is a strict test that needs to consider the legitimate aim as well as the appropriateness and necessity of the measures. In *Leone*, the CJEU clearly emphasised the detailed engagement with the different aspects of the justification. Accordingly, it considered whether the legitimate aim was indeed genuine, whether the measures achieved the stated aim, whether the application was consistent and whether it overreached what was necessary to achieve the aim.

Fundamentally, the objective justification addresses who should carry the burden of systemic gender inequality. Within the free market, where non-discrimination law binds private employers, among others,[662] the obligation needs to be limited to those duties that fall within the employers' control. While employers are not responsible for systemic or structural gender inequality, they are not allowed to exploit it within their organisational structures.

If there is no objective justification available, it is presumed that sex has influenced the decision-making process, even if only unconsciously, as gender concerns have not been considered. Accordingly, budgetary concerns 'cannot themselves constitute the aim pursued by that policy and cannot, therefore, justify discrimination against one of the sexes' even if they may inform the scope of social policy or employment benefits.[663] Accepting economic justifications in more general terms would ignore the fact that structural inequalities make it unlikely for markets to produce gender-neutral results as that would undermine the competitiveness of women on which the free market is based. After all, it will always be in the employers'

662 Others include provisions in national legislation and social partners.
663 Judgment of 24 February 1994, *Roks,* C-343/92, ECLI:EU:C:1994:71 para 35.

interest to pay their employees less, but that does not free the employer from the duty of ensuring a discrimination-free environment in the workplace. A strict application of the necessity requirement, with detailed consideration of alternative measures available can distinguish these issues. While there is some evidence that Member States with traditions of collective bargaining grant social partners a broader margin of appreciation regarding the objective justification,[664] an equally strict objective justification should apply.

7.7 Indirect sex discrimination law's impact within the new economies

It is argued that the refocusing of indirect sex discrimination by promoting a concentration on collective systemic disadvantages beyond specific pools of comparators can also tackle some gendered disadvantages within the new economies. Systemic disadvantage can be identified regarding zero-hour contracts or other flexible contractual arrangements, labour market segregation and algorithmic discrimination.

Challenging these disadvantages may often be difficult as they go to the very heart of the contractual arrangements. If the 'particular disadvantage' of a zero-hour contract compared to other part-time or full-time contracts is the lack of fixed hours, it is the very contract itself that is challenged, not the disadvantage flowing from the worker's neglected position within the labour market. Addressing inequalities caused by labour market segregation via indirect sex discrimination also faces several hurdles. Specifically, the work must be of equal value and the disadvantage must stem from a single source who can address the inequality. Inequality within different sectors with different employers can thus hardly be addressed via individual rights-based procedures, even if job classification systems are often based on gender stereotypes given that they have developed historically, based on gendered indicators and fail to recognise de facto requirements of jobs. Within the gig-economy, the status of workers is far from certain and even if disadvantages are recognised by considering systemic inequalities, it may not always be possible to identify a duty bearer who is responsible for the unequal treatment or could at least be tasked with restoring equality. Some disadvantages within the gig economy may also be challenging to identify. For example, it will be difficult for an individual to demonstrate whether an algorithm systematically disadvantages women. Collective approaches that function along the side of the individual rights-based approach may then be more useful.

Indirect sex discrimination law faces significant challenges to stay relevant within the ever changing labour markets and current legal discourses on equality. The reason for that is twofold. First, considering the demonstrated structural and systemic disadvantages women experience throughout the European Union, indirect sex discrimination still does not have the relevance it should within national jurisdictions. In many Member States the concept is poorly understood by the courts, as well as the wider population, and consequently enjoys little attention within legal discourse. In such a context, it is unlikely that indirect sex discrimination law will demonstrate its full potential. As the individual claim procedure common within the Member States often depends on the individual's awareness of injustice, as well as the specific evidential situation within the frame of reference, it is unlikely that unexplored areas of indirect sex discrimination law will easily reach the courts. Secondly, indirect sex discrimination law is developed assuming relatively stable organisational structures that reflect the current labour market less and less. This does not only refer to the segregation of the labour market, but specifically to flexible work arrangements that limit the time with one employer or question the employment status altogether. How to address these

664 **German** Federal Labour Court, judgment of 17 December 2009, 6 AZR 665/08 and judgment of 19 January 2011, 3 AZR 29/09; **Ireland**, *Flynn* v *Primark* [1996] E.L.R. 78; [1997] E.L.R. 218; [1998] E.L.R. 94; [1999] E.L.R. 89; **Finland** with the exception of Labour Court case TT:1998-34 concerned with the calculation of pay bonuses on the basis of experience, and all 'lawful absences from work' not exceeding 30 days were to be counted as time to be taken into account in the calculation; **Norwegian** Labour Court judgment in Case ARD-2013-11 returned the issue to the social partners. However, the **Dutch** courts demonstrate a more robust scrutiny. While the Amsterdam Court (31-8-2006, ECLI:NL:GHAMS:2006:AZ0535) ruled that the court should only reservedly test the distinctions the social partners had made in their regulation, the Hoge Raad (Supreme Court) (HR 18 December 2015, ECLI:NL:HR:2015:3628, ECLI:NL:PHR:2015:1970 JAR 2016/41) ruled that, even when the distinction under discussion has been made in a collective agreement between social partners, the judge should not hold back in judging the distinction.

disadvantages once identified in an industry that is predominantly governed by algorithms and customer feedback schemes to value or devalue individual work remains to be seen. For indirect sex discrimination law to remain relevant, it needs to be able to address these systemic issues more directly. For that to happen, an alternative collective approach alongside the individual rights procedure needs to be further explored, as it may allow for the consideration of the environment within the broader labour market without too narrow a focus on the specific single source of the challenged disadvantage, or the relevant frame of reference for its assessment.

7.8 Recommendations

The report suggests a refocus or additional focus on systemic gender inequality within the first part of the indirect sex discrimination test; i.e. the establishment of the particular disadvantage, by recognising qualitative and quantitative data within the wider population. While there is limited engagement with such reasoning within the existing case law, the possibility of a qualitative disadvantage should in principle allow for such considerations alongside narrow statistical evidence.

The engagement with such an approach could be supported by legislative guidance that explicitly indicates the various ways in which a 'particular disadvantage' can be established. However, narrow legal definitions should be avoided as this may hamper legal development. Instead, guidelines should provide detailed examples to guide courts through the possible application of indirect sex discrimination and encourage claimants to come forward and strategic litigation. As the concept is still poorly understood in many Member States, this should include basic as well as advanced examples.

Within those legal guidelines, the relevance of qualitative/quantitative evidence should be explored explicitly. Specifically, those guidelines should consider:

- how indirect sex discrimination law can address gender equality issues irrespective of sex, in order to avoid an essentialisation of the female sex and the reinforcing of gender stereotypes;
- what type of intersectional disadvantages can be addressed under the scope of indirect sex discrimination;
- the diverse range of potential claimants;
- the potential scope for duties akin to reasonable accommodation, and
- how disadvantages linked to parental leave can be addressed under the scope of indirect sex discrimination law and how they should be distinct from disadvantages linked to maternity leave and pregnancy.

Beyond that, collective approaches should be explored. While procedural requirements were not the focus of this report, the common national focus on individual rights procedures often makes an exploration of collective disadvantages difficult. However collective approaches are not limited to that.

To address gender disadvantages within the segregated labour market and the new economies, the option of using evidence of systematic disadvantages within specific sectors to demonstrate 'particular disadvantages' needs to be explored. This may require, for example, a softening of the single source requirement, to allow the exploration of sectorial disadvantages independent from the individual claimants or individual duty bearers.

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Questionnaire

I. Understanding of the concept of indirect discrimination

1. Beyond the general legal definition, how is indirect sex discrimination distinguished from direct sex discrimination?
   a. In legislation
   b. In the case law

2. Have there been any controversial cases, were the categorisation was uncertain? This could e.g. relate to the way essentially linked characteristics (other than pregnancy and different retirement age) are recognised under the scope of direct or indirect sex discrimination.

Yes/No

If yes, please provide details.

Explanation: Questions 1 and 2 aim at exploring key differences between direct and indirect sex discrimination as approached on national level that go beyond the difference in legal definition. Within EU law, the distinction has become less certain as the CJEU has become more flexible in its approach and recognised some measures under the scope of direct discrimination, although they did not exclusively disadvantage people with a specific protected characteristic. Outside of the scope of sex discrimination, the CJEU in *Hay* C267/12 considered an exclusion of civil partnerships from certain marriage benefits to constitute direct discrimination based on sexual orientation although the exclusion did not exclusively affect same-sex/homosexual couples. Some cases on sex discrimination have caused similar uncertainties. For example, *Thibault* C-136/95 concerned a rule that excluded Thibault from a special assessment procedure for the purpose of promotion because she was absent for more than six months in the relevant year. Because some of her absence was due to maternity leave, the CJEU somewhat unsurprisingly considered this under the scope of direct sex discrimination. However, the rule was applicable to men and women alike. Other cases that referred to absences from work/education in neutral terms but included criteria that only applied to one sex were addressed under the scope of indirect discrimination. For example, in *Schnorbus* C-79/99, the Court treated different (beneficial) treatment on grounds of compulsory military service under the scope of indirect discrimination, although the conscription duty only applied to men. In

C-173/13 *Leone*, it considered a policy that awarded service credits for career breaks due to childcare under the scope of indirect sex discrimination, because it, by definition, included all biological mothers on compulsory maternity leave while all other eligible leaves were voluntary.

II. Forms and scope of indirect discrimination

3. What are the most common forms of indirect sex discrimination within employment (including occupational and statutory social security and self-employment as outlined above)?

In your answer please refer to any surveys of equality bodies, NGOs or public authorities etc (if available) that have been published in the last 5 years and are concerned with the causes and effects of indirect sex discrimination (you can copy in here also the relevant reports mentioned already in the country report). Specifically, your answer should identify the causes of indirect sex discrimination. This could address questions like

1.1. What type of employment contracts are specifically prone to matter within the context of indirect sex discrimination (e.g. flexible working relations such as on-call contracts, zero-hour contracts, platform work, part-time, fixed-term contracts)?

1.2. What type of flexible care/work arrangements are likely to be the underlying cause for indirect sex discrimination (e.g. parental leave, care leaves, adjustments of duration, working time, location, shift work) and why (e.g. percentage of women who take parental leave, disadvantages that are connected to entitlement such as loss of pay, seniority, entitlements in case of dismissal, required reduced working time)?

1.3. What employment conditions (pay/pensions and treatment) are most commonly denied via the use of apparently neutral criteria that create a particular group disadvantage (e.g. supplements, bonusses, lease cars, promotion possibilities, dismissal, employer's occupational social security contributions and occupational pensions)?

1.4. Are there any other types of arrangements or characteristics commonly used within the employment market, that have been identified as creating a particular group disadvantage (e.g. height/strength requirements, seniority, need for recommendation for promotions, minimum number of hours and/or income required for entitlements)?

Explanation: The question aims at identifying key areas of the employment relationship where indirect sex discrimination is prevalent and some of the underlying social inequality dominant within the states covered in this report that causes the disparate impact. As the report specifically focuses on disadvantages linked to part-time and flexible work and care-related leave, it would be specifically useful to consider to what degree disadvantages persist within the states. As far as possible, we hope to reference recent surveys (of the last 5 years) highlighting gender differences in these areas if available (including those you may have mentioned already in the country report).

4. Is the legal framework provided by EU law able to tackle the common forms of indirect sex discrimination identified in question 3?
   a. If yes, please briefly identify any specific aspects of EU indirect sex discrimination law that are specifically relevant in this context.
   b. If not, please outline (if any) national approaches or practices that go beyond the EU legal framework to fill potential gaps.

5. What type of disadvantages do part-time workers suffer within the context of employment and how are these viewed in the light of indirect sex discrimination? Specifically focus on case law concerned with:
   a. Regular pay, bonuses, redundancy pay;
   b. Dismissal and promotion;
   c. Occupational pension schemes (focus on key cases);

   d. Statutory social security (e.g. unemployment, retirement pensions, (early) invalidity pensions) (focus on key cases);
   e. Other employment entitlements.

6. Are there other types of contracts (e.g. flexible contracts, temporary contracts, quasi self-employed within the gig economy) that have raised concerns within the context of indirect sex discrimination? Please include case law where available.

7. What (detrimental) effect has parental leave (or other leave related to childcare) on entitlements and how are these effects viewed within the context of indirect sex discrimination? Specifically focus on case law concerned with:
   a. Regular pay, bonuses, redundancy pay;
   b. Dismissal and promotion;
   c. Occupational pension schemes;
   d. Statutory social security (e.g. unemployment, retirement pensions, (early) invalidity pensions);
   e. Other employment entitlements.

Explanation questions 4-6: In question 3, we asked about causes and underlying reasons for indirect sex discrimination with reference to surveys and literature. We now like to consider the effect of a-typical employment relationships and parental leave more specifically. The answer should focus on case law and deal with the specific benefits. If case law is not available, reference could be made to literature and surveys if the information is more specific than already outlined above in question 3.

8. Does the way parental leave entitlements are structured in national law cause any concerns within the context of indirect sex discrimination (e.g. because they require certain reductions in pay or working time that then have a detrimental effect on women, see e.g. C-366/18 *Ortiz Mesonero*)?
   a. Within case law;
   b. Within literature;
   c. Within surveys.

Explanation: There is a difference between detrimental consequences because one has taken parental leave as outlined above in question 6 and the way rights to parental leave are structured. Question 7 asks about the latter. Specifically, it asks whether the way parental leave can be taken, will always carry some disadvantage (e.g. because of reduction of working time) or whether there are entitlements that do not carry an obvious disadvantage (e.g. being excluded from shift work and/or flexible working requirements but retaining the contractual hours and pay).

9. Are issues of intersectionality addressed under the scope of indirect sex discrimination in the field of employment (e.g. sex and religion -ban on headscarves, sex and age, sex and obesity/disability)? Specifically, are these cases considered under the scope of
   a. Indirect sex discrimination;
   b. Direct discrimination based on one ground only (e.g. religion only);
   c. Intersectional cases;
   d. All of them above.

If available, please briefly outline any relevant case law and/or any relevant literature on this issue (including research, surveys) Explanation: EU legislation recognises that women specifically suffer from multiple or intersectional discrimination that is based on a combination of protected characteristics (recital 14 Race Directive 2000/43/EC; recital 3 Framework Directive 2000/78/EC). Indirect sex discrimination can be used to address forms of discrimination. For example, a ban on headscarves will predominantly disadvantage women, because women are more likely to wear headscarves, even if not all or even the majority of women do so. Within CJEU case law the intersectional approach has only enjoyed little attention. In headscarf cases the Court thus focused on religious discrimination, although Advocate General Sharpston

did recognise the rules' detrimental effect on women (C-157/15 *Achbita*; C-188/15 *Bougnaoui*). It would be good to know how cases like this are framed and addressed in national law, e.g. as cases of religious discrimination, as cases of indirect sex discrimination or as cases of intersectional discrimination or all of the above.

III. Application of the indirect discrimination and objective justification test

10. Does the victim of indirect sex discrimination have to belong to the disadvantaged group?

Yes/No
If not, are there additional requirements necessary for the victim to be protected under indirect sex discrimination law?

Explanation: Within race discrimination, the CJEU has considered it unnecessary for the victim to belong to the disadvantaged group as long as the 'particular disadvantage' could be demonstrated (C-83/14, *CHEZ*). This suggests that the discrimination is assessed on an objective basis irrespective of the victim. Within indirect sex discrimination similar issues could occur. For example, a measure that generally disadvantages women (e.g. part-time discrimination) may also disadvantage some men (e.g. male part-time workers), who could be potential claimants. If such a case would be considered under the scope of indirect discrimination, additional requirements could be introduced. E.g. it could be relevant why the male claimant is a part-time worker and thus 'suffers alongside' the disadvantaged group? In Coleman, the Court further underlined that discrimination by association also falls within the scope of direct disability discrimination. It thus did not matter that it was not the claimant but the claimants' son who was disabled. In addition to that, the care element was a prevalent but underexplored factor within the case. Thus, it was the disability of her son together with her care responsibility for him that led to the employers' differential treatment. This was thus a potential case of indirect sex discrimination. Accordingly, it is worth noticing if men who take over similar care responsibilities are offered the same degree of protection.

11. To what degree does comparability matter within indirect sex discrimination case law? Are there trends or cases that suggest that the courts/equality bodies or other institutions do consider whether the different groups are comparable or are they more focused on the unequal outcome overall?

Please provide details by specifically identifying the origin of the mentioned approaches.

Explanation: The questions aim at exploring the precise scope of indirect discrimination. Comparability remains a somewhat controversial issue within EU indirect sex discrimination law (see discussion above on comparability, same situation test and individual assessment of each measure).

12. Does the 'comparability requirement' as outlined in question 10 have any specific consequences for specific groups of atypical workers such as agency workers, temporary workers, workers with a 0-hour contract?
    If yes, please provide details with reference to case law if available.

13. Do national courts or equality bodies strictly enforce the 'single source' requirement as outlined by the CJEU case law above?
    If yes and available, please provide some examples within the case law to illustrate the point.
    If not, please outline how equality bodies and courts determine the scope of responsibility within the concept of indirect sex discrimination within employment (with reference to case law if available).

14. Beyond the legal definition (as outlined already in the country report), do courts/equality bodies approach the objective justification as part of the legal definition of indirect sex discrimination or as exception and does that have any consequences for the assessment of the case?

If available, please provide examples.

Explanation: The objective justification can either be part of the legal definition to establish indirect discrimination or viewed separately, as an exception to the prohibition to discriminate. While the shift of burden of proof will in both cases require the employer to demonstrate any possible objective justification, the differences may encourage differences in assessment. For example, courts may be willing to consider the objective justification before establishing the 'particular disadvantage' if they consider the justification to 'save' the measure, whether there is a 'particular disadvantage' or not. This in turn could then reduce the visibility of the structural inequalities prevalent within the employment market and potentially weaken the strictness of the objective justification assessment, given that it is made without reference to de facto (and potentially severe) consequences of the measure.

15. Does the case law or legislation indicate or apply any relevant distinction between the notions of 'pay' and 'treatment' in indirect sex discrimination law (for example, how the disproportional disadvantage is established or justified or how the breach of the right to equal pay/treatment is assessed)?

Yes/No
If yes, please briefly outline the potential or actual implications of that.

Explanation: Article 14(1)(c) Directive 2006/54/EC subsumes pay under employment and working conditions and thus abandons the distinction between pay and treatment. However, Article 157 TFEU still only refers to equal pay and Member States may have kept this distinction alive. For example, regarding implied terms in employment contracts. Moreover, the difference of primary and secondary EU law and direct effect of Article 157 TFEU could potentially mean that the latter allows for a more direct influence of the CJEU case law on the national system than the former. If there is a distinction between both, it would be good to know whether the distinction has any (practical) relevance. Specifically, whether there is a difference in the legislation or not, and if there are differences in the equality bodies'/courts' approaches towards pay and treatment in cases on indirect sex discrimination.

16. Are there any specific avenues that have proven to be successful in justifying detrimental effects within the national case law?

Explanation: the question aims at exposing justifications that have been proven successful and how it has to be framed. While national courts have much discretion within the area, the CJEU has given some indication as outlined above. For example, it has rejected budgetary considerations in themselves and general arguments and assumptions. However, in principle it has accepted sound management or reward of experience (in the context of seniority) as legitimate aims. This can have serious consequences for women who are more likely to take career breaks or (temporarily) reduce their working time due to childcare responsibilities. Accordingly, the framing of the legitimate aim in the light of the specific disadvantage is important. For example, the way part-time periods of service and/or periods of parental leave can be excluded for the calculation of future entitlements may depend on the (legitimate) aim. For example, depending on the aim the necessity test will cover different issues as different periods may need to be included or excluded.

17. How strict is the objective justification test regarding
    a. The legitimate aim;
    b. Necessity;
    c. Suitability.

If available, please provide concrete examples.

Explanation: the CJEU has left much discretion to the national courts and a successful justification defence very much depends on the circumstances of the case. However, some of the Court's guidance has been outlined above. The scope of accepted objective justifications and the strictness of the test can significantly influence the effectiveness of the ban on indirect sex discrimination and the obligation it imposes on employers.

18. Have any other specific problems presented themselves as regards the application of the indirect discrimination test, for example regarding
    a. the single source requirement?
    b. the identification of disadvantages/ detrimental treatment (pro-rata, separate consideration of each measures, etc)?
    c. the objective justification?

Explanation: Please see a summary of the CJEU's guidelines above.

IV. Enforcing the prohibition of indirect discrimination; the burden of proof (individual and collective redress)

19. In your expert opinion, are there any specific approaches regarding enforcement and burden of proof within the national context that ensure or undermine the effective enforcement of indirect discrimination law? This could include shortcomings and best practices regarding:
    a. The use of statistical or other evidence to establish a 'particular disadvantage'
    b. Evidential thresholds that shift the burden of proof
    c. Claimant's ability to access to defendant documentation such as internal papers on recruitment, pay or promotion
    d. Collective redress and activities of equality bodies independently from individual claimants

    If available, please provide some examples to illustrate your answers. Do not limit your answer to the national compliance with the CJEU's guidelines.

Explanation: The report focuses on the concept of indirect sex discrimination, the many faces it occurs and alternative or creatives ways to assess or approach it to address de facto disadvantages. Enforcement (or outcomes/compensation) are thus not the focus of this report. Nevertheless, it would be good to identify any specific best practices or shortcomings, especially if they affect the substantive scope of the concepts, and if they take a different approach than suggested or required by the CJEU. For example, it could explore the relevance of statistical proof and other evidence and whether the courts have invited or required additional evidence/considerations to shift the burden of proof if statistical evidence demonstrates a 'particular disadvantage'. The CJEU's guidelines on the use of statistical data and beyond are outlined above. Once established with certainty, the CJEU does not require any additional explanation for the effect (In *CHEZ* C-83/14 regarding race discrimination, the CJEU made clear that it is 'sufficient that, although using neutral criteria not based on the protected characteristic, it has the effect of placing particularly persons possessing that characteristic at a disadvantage'

V. General assessment; good practices and shortcomings

20. How would you overall assess the national law on indirect sex discrimination related to employment? In your answer, please pay attention to good practice and/or shortcomings. Please specifically highlight if national legislation or case law goes beyond the EU legal framework to fill any gaps within the protection. Illustrate this with reference to case law if available.

21. Please list any relevant literature for the bibliography. If not in English, please provide a translation of the title.

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