THE RACIAL EQUALITY DIRECTIVE AND EFFECTIVE PROTECTION AGAINST DISCRIMINATION: MISMATCHES BETWEEN THE SUBSTANTIVE LAW AND ITS APPLICATION

Monika Ambrus, Marjolein Busstra and Kristin Henrard[*]

Abstract

The success of the Racial Equality Directive (RED) in terms of effective protection against discrimination depends inter alia on the coherence and correlation between its substantive and procedural provisions, both in terms of the wording of the Directive and in terms of its interpretation and application. In this article, three 'mismatches' between the substantive law and its application are identified. Effective protection against discrimination requires that these mismatches are avoided. First of all, a teleological interpretation of a substantive provision should be matched by corresponding (broad) enforcement provisions. Secondly, the interpretation and application of the definitions of direct and indirect discrimination need to ensure a proper delineation of these substantive concepts. Thirdly, these substantive concepts have to be appropriately translated in terms of the enforcement dimension. In this respect, the ECJ has an essential role to play. In view of its special position as ultimate interpreter and guardian of the unity of EU law, it needs to take up the task of ensuring the 'match', while providing adequate guidance to the national courts. Although the ECJ remedied the first mismatch through its generous interpretation of the 'flawed' enforcement provision, it has failed to avoid the two other mismatches and thus has not realised the most effective protection possible against discrimination. It is to be hoped that the willingness to avoid mismatches between substantive law and its application will manifest itself more broadly in the future.

1 Introduction: The Importance of Effective Protection against Discrimination

Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (hereinafter, the Racial Equality Directive or RED)[1] lays down European rules for one of the most fundamental rights of human beings. As such, it has often been called an important – if not the most important – avenue for the protection of ethnic minorities within the EU.[2] In order to satisfy these expectations, its provisions have to be matched by effective protection in practice. The importance of effective protection of fundamental rights is often underscored.[3] This is certainly the case for the prohibition of discrimination, not in the least because it is considered to provide crucial protection for vulnerable, often disadvantaged groups.

---

[*] Monika Ambrus is assistant professor at the Erasmus University of Rotterdam; Marjolein Busstra is policy advisor at the Netherlands Ministry of Foreign Affairs; Kristin Henrard is professor of minority protection also at the Erasmus University of Rotterdam. This publication has been made possible by a generous VIDI grant of the Netherlands Foundation of Scientific Research. The authors wish to thank an anonymous referee and the editorial board of the Erasmus Law Review for thoughtful comments. The usual disclaimer applies.

[1] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180/22.

[2] See, inter alia, B. De Witte, 'The Constitutional Resources for an EU Minority Protection Policy' in G.N. Toggenburg (ed.), *Minority Protection and the Enlarged European Union: The Way Forward* (2004) 107 at 116-117; G.N. Toggenburg, 'The Race Directive: A New Dimension in the Fight against Ethnic Discrimination in Europe' (2001/2) 1 *European Yearbook on Minority Issues* 231 at 234; J. Swiebel, 'The European Union's Policies to Safeguard and Promote Diversity' in E. Prügl and M. Thiel (eds.), *Diversity in the European Union* (2009) 21 at 27-29.

[3] The European Court of Human Rights steadily emphasises that the rights enshrined in the Convention should not be purely theoretical or illusory but should rather be practical and effective. See, inter alia, G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (2007) at 79;

Several factors are relevant to effective protection against racial discrimination. While one tends to think first and foremost in terms of actual, effective enforcement,[4] several substantive matters and related matters of 'application' also have a bearing on this issue.

The text of the RED contains several indications that the drafters intended to provide strong and effective protection against racial discrimination. This can be deduced, inter alia, from the broad definition of prohibited forms of discrimination (such as an instruction to discriminate and racial harassment),[5] the unusually broad material scope of the Directive (by 2000 standards) and the very restricted possibilities it offers to justify differentiations on the basis of racial or ethnic origin.[6] Furthermore, the RED has been hailed in particular for its innovative focus on remedies and effective enforcement.[7] In this context, attention tends to focus on the rule on the special allocation of the burden of proof (Article 8), which facilitates the position of the claimant,[8] the protection against victimisation (Article 9) and the provision on the legal standing of organisations with a 'legitimate interest' to bring enforcement actions 'either on behalf or in support of the complainant'(Article 7(2)).

Still, the extent to which the RED provides effective protection against racial discrimination also depends greatly on the way in which it has been interpreted and applied by the ECJ. The European Court of Justice is the highest authority as regards the interpretation and application of the concepts and standards of EU law and thus influences the practice of national courts.

This article focuses on a particular concern in the area of effective protection against discrimination, namely the need to avoid mismatches between substantive law, on the one hand, and its application, on the other. Indeed, optimal and effective protection against discrimination presupposes and requires that the substantive provisions and the protection they appear to offer are 'matched' by their application. In this context, the word 'match' refers not only to the relationship between substantive law and concepts, on the one hand, and the related enforcement provisions, on the other, but also to the actual application of particular concepts and provisions.

In this article, three 'mismatches' pertaining to the interpretation and application of the RED are identified and analysed. The underlying aim of the article is to clarify what is needed to avoid these mismatches. The first mismatch concerns the lack of adequate coverage of the enforcement provisions in relation to a teleological interpretation of a substantive provision (telos versus text). The second mismatch pertains to the lack of a clear and consistent line of interpretation concerning the basic substantive concepts (direct and indirect discrimination) and their respective scope. Finally, the third mismatch

---

A. Mowbray, 'The Creativity of the European Court of Human Rights' (2005) 5 *Human Rights Law Review* 57 at 72-78. This line of case law can be traced back to *Marckx* v. *Belgium*, 13 June 1979, A 31, para. 31; and *Airey* v. *Ireland*, 9 October 1979, A 32, para. 24.

4 H. Rombouts, P. Sardaro and S. Vandeginste, 'The Right to Reparation for Victims of Gross and Systemic Violations of Human Rights' in K. De Feyter et al. (eds.), *Out of the Ashes: Reparation for Victims of Gross and Systemic Human Rights Violations* (2006) 345 at 360; I. Higgins, 'Enforcement and the New Equality Directives' in C. Costello and E. Barry (eds.), *Equality in Diversity: The New Equality Directives* (2003) 391 at 397; Toggenburg, above n. 1, at 239-240.

5 Article 2(3) and (4) of the RED.

6 See, inter alia, M. Bell, *Anti-Discrimination Law and the European Union* (2002) at 75-78. See also D. Schiek, L. Waddington and M. Bell, *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (2007) at 269-271.

7 See, inter alia, M. Bell, 'Combating Racism through European Laws: A Comparison of the Racial Equality Directive and Protcol 12' in I. Chopin and J. Niessen (eds.), *Combating Racial and Ethnic Discrimination: Taking the European Legislative Agenda Further* (2002) 7 at 17; U. O'Hare, 'Enhancing European Equality Rights: A New Regional Framework' (2001) 8 Maastricht Journal of European and Comparative Law 131 at 151-153.

8 'These difficulties of proof inevitably have an impact on the effective protection of equality rights.' See INTERIGHTS, 'Written comments in the case of *Nachova and others* v. *Bulgaria*' (2005) at 1. Kokott emphasises that '[l]egal scholars in the United States have demonstrated the mutual dependency between applying adequate rules on the apportionment of the burden of proof, including the adoption of adequate measures of persuasion, and the full enforcement of individual rights'. See J. Kokott, *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems* (1998) at 57.

flows from the lack of an adequate translation of the different substantive concepts of discrimination in the Directive into procedural terms, especially in the RED's provisions on the allocation of the burden of proof and the underlying review model.

The following evaluation relies on the definitions used in the RED, contemporary non-discrimination doctrine and the ECJ's non-discrimination case law. It pays special attention to the one and only (substantive) judgment that has been issued in relation to the RED so far, namely the ECJ's preliminary ruling in *Centrum voor gelijkheid van kansen en racismebestrijding* v. *Firma Feryn NV* (hereinafter, the *Feryn* case).[9] The analysis of the three mismatches proceeds in the above-mentioned order. While the discussion of the first mismatch focuses purely on the *Feryn* case, the other two are evaluated according to a broader frame of reference, using the *Feryn* judgment as an illustration.

The *Feryn* case concerns a public announcement by an employer that he would not hire persons of Moroccan origin because his customers would not accept them. The judgment has been hailed for its message that a public statement can in itself amount to an instance of prohibited discrimination.[10] The Court recognised that discriminatory speech can deter people from applying for work and thus blocks their access to the labour market.[11] This interpretation is in line with the *ratio legis* of the Directive, which is to provide robust protection against racial discrimination, and clearly heightens the effectiveness of the protection against racial discrimination.

2 Mismatch I: Telos v. Text

The teleological interpretation of legal texts is a commonly accepted and widely supported method of analysis.[12] The judgment in the *Feryn* case clearly reveals the use of such teleological interpretation.

Article 2(2)(a) of the RED stipulates that direct racial discrimination 'shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin'. Explicitly excluding certain ethnic groups from the pool of potential employees seems to imply less favourable treatment for them *because of* their membership of an ethnic group, and in that sense would seem to constitute direct discrimination. This remains so even though the wording of the RED, more particularly the use of the word 'treatment', would seem to suggest some form of action.[13] After all, the aim of the RED is to eradicate discrimination in the widest sense possible. Indeed, according to the ECJ in the *Feryn* case, the mere public statement of discriminatory selection criteria (or more generally a recruitment policy) can qualify as 'treatment' and suffice to constitute an instance of direct racial discrimination, irrespective of whether there are actual victims of this policy or whether victims actually come forward.[14]

The critical paragraph of the judgment reads as follows:

---

[9] Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding (Centre for equal opportunities and combating racism)* v. *Firma Feryn NV*, [2008] ECR I-5187 (hereinafter, ECJ, *Feryn* or AG, *Feryn*).

[10] See, inter alia, F. Bayreuther, 'Drittbezogene und hypothetische Diskriminierungen' (2008) *Neue Zeitschrift für Arbeitsrecht* 986-990; J. Cavallini, 'Une déclaration publique d'un employeur peut constituer en elle-même une discrimination fondée sur la race ou l'ethnie' (2008) 15 *La Semaine Juridique – Social* at 25-26; A. Potz, 'Öffentliche Äußerungen eines Unternehmers im Lichte des europäischen Gleichbehandlungsrechts' (2008) *Zeitschrift für europäisches Sozial- und Arbeitsrecht* 495-505; L. Fabiano, 'Le "parole come pietre" nel diritto antidiscriminatorio comunitario' (2008) *Diritto pubblico comparato ed europeo* 2054-2058.

[11] See below for a quote of the critical paragraph (para. 25).

[12] See, inter alia R. Alexy, *A Theory of Constitutional Rights* (2004) at 371-373; Mowbray, above n. 2, at 59-60.

[13] See, inter alia, T. Makkonen, 'Main Causes, Forms and Consequences of Discrimination', action.web.ca/home, at 8.

[14] In this respect, the ECJ seems to follow the approach taken by the House of Lords, which emphasises that words or acts of discouragement can also be regarded as 'treatment'. See K. Monaghan, *Equality Law* (2007) at 290-291.

The fact that an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin, something which is clearly likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market, constitutes direct discrimination in respect of recruitment within the meaning of Directive 2000/43. *The existence of such direct discrimination is not dependent on the identification of a complainant who claims to have been the victim*.[15]

This teleological reading of the concept of discrimination triggered heated discussions during the hearing of the case before the ECJ. In several interventions, the implications of this understanding of the concept of direct discrimination for the scope and conditions of legal standing were questioned by third states.

According to the intervening states, accepting that a mere statement could amount to an instance of discrimination, irrespective of the presence of actual discriminatory practice and thus actual victims, would not be in line with the provision on legal standing of the RED. This provision limits state obligations in respect of defence of rights (obligations to ensure that judicial or administrative procedures for the enforcement of the obligations under the Directive are available) to cases where there are actual victims. Indeed, if complaints are not brought by the actual victims themselves, this can be done by 'associations, organisations or other legal entities, which have … a legitimate interest in ensuring that the provisions of this Directive are complied with' but only in so far as they would 'engage on behalf or in support of the complainant with his or her approval' (Article 7(2)). This limitation was consciously inserted in order to ensure that states were not obliged to provide for *actio popularis* claims.[16] The intervening states claimed that, as a consequence, the concept of direct discrimination could only be applied to cases in which there were actual victims and not to mere instances of discriminatory speech.

The ECJ acknowledged the alleged mismatch between the robust, teleological interpretation of the concept of direct discrimination, on the one hand, and the enforcement provisions, on the other, but refused to 'mend' it by levelling down the protection against discrimination by excluding mere speech as a potential instance of discrimination. It attempted to resolve the 'mismatch' between its teleological reading of the concept of 'direct discrimination' and the enforcement provisions by pointing out that the absence of an obligation on states to provide *locus standi* to particular associations did not prevent them from doing so. Although this argument may not be wholly convincing, it is positive that the Court addressed the mismatch by opting for the higher level of protection against racial discrimination rather than the lower one. The Court bypassed the textual limitations of the enforcement provisions through its generous interpretation of those provisions, so as to provide the appropriate level of protection against discrimination.

Ideally, in order to avoid this type of mismatch, the wording of new legislative provisions should ensure that the legal standing provisions are able to 'keep up' with teleological readings of the substantive provisions. To the extent that this does not materialise, it is essential that the ECJ maintains its generous teleological interpretation of both the substantive concepts (and provisions) and the corresponding enforcement provisions.

3 Mismatch II: Text and Theory v. Practice – The Delineation of Direct v. Indirect Discrimination

The second mismatch discussed in this article is a hypothetical one in the sense that it has not yet materialised in practice but could do so in the near future. An investigation of

[15] ECJ, *Feryn*, para. 25 (emphasis added).

[16] The general view of Article 7(2) of the RED is indeed that it cannot be interpreted as either permitting or obliging states to provide for *actio popularis* claims, since the consent of the victim is required. See Higgins, above n. 3, at 399-400; E. Barry, 'Different Hierarchies – Enforcing Equality Law' in C. Costello and E. Barry (eds.), *Equality in Diversity: The New Equality Directives* (2003) at 421. Some argue that it would still enable member states to introduce an *actio popularis.* See B. Bodrogi, 'Legal Standing – The Practical Experience of a Hungarian Organisation' (2007) 5 *European Anti-Discrimination Law Review* 23 at 25.

the ECJ's case law in the field of gender equality reveals that the Court does not apply a fully consistent and coherent approach as regards the delineation of the concepts of direct and indirect sex discrimination. This raises the question whether the ECJ will similarly obfuscate the difference between the concepts of direct and indirect discrimination in the context of the RED, even though the text of this Directive contains clear and sensible definitions that allow for a conceptually sound delineation of both concepts. In other words, there is a risk that the text of the RED will not be matched by clear and coherent practice of the ECJ: a potential mismatch between text and theory versus practice.

It is important to emphasise that the question is not of mere theoretical relevance, because the RED provides a higher level of protection against direct discrimination than against indirect discrimination. While the RED allows for a general objective justification possibility for alleged indirect discrimination, instances of alleged direct discrimination only know two narrowly interpreted exception possibilities.[17]

The following sections discuss: the theoretically most appropriate delineation arising from the definitions in the text of the RED (3.1); the unclear practice of the ECJ in the field of gender equality (3.2); and possible consequences of this case law for case law concerning the RED (3.3).

3.1 Delineation of Direct v. Indirect Racial Discrimination Arising from the Text of the RED

The most obvious starting point for the delineation of direct versus indirect racial discrimination can be found in the definitions contained in Article 2 of the RED. Article 2(2)(a) of the RED provides that

> direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin.

Article 2(2)(b) of the RED provides that

> indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

On the basis of these two provisions, a number of observations can be made.

3.1.1 Direct v. Indirect Causal Link

First of all, the term 'direct discrimination' implies a *direct* causal link between a person's racial or ethnic origin and the treatment complained of, whereas 'indirect discrimination' points to an *indirect* causal link. A direct causal link can be understood as a link that can be immediately established, without the help of an additional circumstance that connects the measure to the person's racial or ethnic origin. For example, a sign above a shop stating 'No Turks allowed' involves a direct causal link, because there is no intermediary circumstance necessary to ascertain that it is a Turkish person who cannot enter the premises. In other words, there is a direct connection between being Turkish and the disadvantage of not being able to enter the shop. One does not need to look at the particular situation of Turkish persons in general or at the effects that the sign has in practice in order to know that it disadvantages persons on the basis of their racial or ethnic origin.

In cases of indirect discrimination, there is no direct causal link and additional circumstances are needed to establish the causal connection with the person's racial

[17] The definition of indirect discrimination in Article 2(2)(b) of the RED makes clear that objectively justifiable, proportionate measures do not amount to indirect discrimination. No such general statement is contained in Article 2(2)(a) of the RED, which contains the definition of direct discrimination. Instead, the RED explicitly – and exhaustively – mentions two exceptions to the prohibition of differences in treatment based on race: using race as a genuine and determining occupational requirement (Article 4 of the RED) and taking positive action in favour of a particular racial or ethnic group (Article of the 5 RED).

or ethnic origin. Take, for example, a language requirement for a particular job. It is necessary to take into account the additional circumstance that it is usually people of foreign origin who do not speak the majority language in order to establish a causal link between the disadvantage of not qualifying for the job and the protected characteristic of being of foreign origin. This link is indirect, because it is based on the characteristic of not speaking the majority language.

There is a complicating factor regarding racial and ethnic discrimination that is relevant here. The notions of racial and ethnic origin are social constructs, which means that they are constructed in the minds of people and do not refer to objectively identifiable categories. The meaning of racial and ethnic origin is established for each society by the practice of its members: in-groups and out-groups are determined through social interaction. Consequently, the characteristics used by the members of a particular society to determine whether a person belongs to a perceived in-group or out-group may vary. In the Netherlands, for instance, Muslims and Turkish and Moroccan people are typically perceived as out-groups. Dutch people use the characteristics of Arab-sounding names, language, physical traits and religious wear to determine whether a person belongs to one of these perceived racial or ethnic groups. In other words, these characteristics are used as proxies for the perceived categories of 'Turks' and 'Moroccans'. In fact, racial and ethnic categorisation always involves the use of proxies, because there are no objective criteria for establishing racial or ethnic groups.

Some of these proxies invariably come with membership of a racial or ethnic group as perceived in society and cannot be thrown off by their bearers. This is the case, for example, with skin colour, a proxy that is often used to identify persons belonging to a perceived racial group, since a person cannot choose to have a particular skin colour. Differences in treatment on the basis of these characteristics, which are inextricably linked to race and ethnic origin, should automatically be categorised as differences in treatment on the basis of racial or ethnic origin, that is to say, as direct racial discrimination. Thus, if a person is treated differently because of his dark skin colour or because of the shape of his nose, he is directly discriminated against on the basis of his – perceived – racial or ethnic origin.

However, most proxies involve characteristics that are less obviously connected to the membership of a perceived out-group, because they involve an element of choice. For example, speaking Arabic or wearing a headscarf are proxies that are often used in daily life to establish a person's assumed different racial or ethnic origin, but they are not inextricably linked to the membership of the racial or ethnic group. Some persons belonging to the particular group will speak the majority language fluently or not wear a headscarf. One might be inclined to treat differences in treatment based on these proxies as indirect discrimination, since they appear not to be directly causally linked to racial or ethnic origin. This is true only to some extent. If language or religion are the real reasons for the differential treatment, direct discrimination on the grounds of racial or ethnic origin is indeed not the appropriate label. If an employer genuinely needs his employees to speak fluent Dutch, his decision not to hire someone who only speaks Arabic cannot be considered to amount to using the applicant's language affinity as a proxy for his perceived racial or ethnic origin. Given that differentiations based on religion or language tend to disproportionately affect particular ethnic groups, this is actually an example of indirect discrimination.

Still, if language, religion or a similar characteristic is actually used as a proxy for a person's perceived racial or ethnic origin, direct discrimination is the more appropriate label. If an employer refuses to hire a person whose mother tongue is Arabic because he does not want any 'Muslims' on his team, he is directly discriminating on the basis of racial or ethnic origin. After all, the applicant's membership of the group of 'Muslims' is the real reason for the way in which he has been treated. This qualifies as a direct causal link.

Clearly, each claim of racial or ethnic discrimination involving the use of a characteristic that may or may not be used as a proxy for membership of a perceived racial or ethnic group deserves careful consideration in order to determine whether it relates to direct or indirect discrimination.

3.1.2 Motive and Cause v. Effects

Secondly, the definitions of direct and indirect discrimination in the RED reveal that direct discrimination is about the underlying *motive or cause* for some difference in treatment, whereas indirect discrimination focuses on the *effects* of a particular treatment. The definition of direct discrimination speaks of a less favourable treatment 'on the grounds of' racial or ethnic origin, whereas the definition of indirect discrimination refers to an apparently neutral provision, criterion or practice that 'would put at a particular disadvantage' certain racial or ethnic groups. This means that, in concrete cases, direct discrimination is established by looking at the underlying cause or motive for the treatment that is claimed to be discriminatory, whereas indirect discrimination is established by looking at the particular effects of the treatment on the perceived racial or ethnic group.

If I claim that an employer directly discriminated against me by not hiring me for a post because I am Dutch, the relevant question to ask is whether my being Dutch was the reason why the employer did not hire me. If I claim that a requirement for a particular post in the United Kingdom according to which I must speak fluent English constitutes indirect discrimination on the grounds of my Dutch origin, the relevant question to ask is whether this requirement disproportionately affects people not belonging to the majority ethnic group in the United Kingdom.

In line with general anti-discrimination theory, it should be emphasised that intent is not required for a qualification of direct discrimination.[18] In other words, it is not necessary that the alleged perpetrator of direct discrimination is consciously seeking to disadvantage persons belonging to a particular racial or ethnic group. Indeed, prejudiced beliefs about persons belonging to particular racial or ethnic groups can operate at a subconscious level.[19] It is therefore possible that a person's actions amount to direct discrimination, because of their reliance on a stereotypical or biased belief, without that person actually wanting to disadvantage persons belonging to a particular racial or ethnic group.[20]

Whereas discriminatory intent is therefore not requisite, it should be stressed that where such intent is present, the qualification of direct discrimination should automatically be applied, regardless of the formal reason given by the alleged perpetrator for his behaviour. If an employer claims, for instance, that the real reason for his refusal to hire a particular person was the person's insufficient command of the majority language, whereas evidence shows that he did not want to hire the person due to his apparent membership of an ethnic group, his behaviour should be qualified as direct discrimination. After all, the real motive for the rejection of the person's application was his different ethnic origin. These cases are often referred to as covert direct discrimination, since the discriminatory component is not visible at first glance.[21]

However, covert direct discrimination should not be confused with indirect discrimination, which also involves cases where the discriminatory component only becomes visible when one considers additional circumstances of the case. In cases of covert direct discrimination, there is a direct causal link to the protected characteristic, since the *real* reason behind the facially neutral measure was to disadvantage persons belonging to a particular perceived racial or ethnic group. Such a direct causal link is

---

[18] E. Ellis, *EU Anti-Discrimination Law* (2005) at 103.

[19] C. Bayart and C. Deiteren, 'Direct en indirect onderscheid' in C. Bayart, S. Sottiaux and S. Van Drooghenbroeck (eds.), *De Nieuwe Federale Antidiscriminatiewetten* (2008) 172 at 195; Ellis, above n. 18, at 103.

[20] See Lord Nicholls' argumentation in the UK House of Lords case *Nagarajan* v. *London Regional Transport*, [1999] ICR 877: 'human beings have perceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did.'

[21] See, for instance, D. Schiek, L. Waddington and M. Bell (eds.), *Non-Discrimination Law* (2007) at 185-186.

not present in a case of indirect discrimination, which involves facially neutral measures for which the underlying reason is not connected to a person's perceived racial or ethnic origin.

3.1.3 Direct v. Indirect Discrimination: Appraisal

These two observations (direct versus indirect causal link and motive versus effect) warrant the conclusion that the qualification of 'direct discrimination' should be reserved for those instances of disadvantageous treatment for which the underlying motive or cause is a protected ground and which can therefore be directly causally linked to this ground. In contrast, 'indirect discrimination' covers measures that are not based on a protected characteristic but have a disadvantageous impact on members of a particular racial group because their special needs are not taken into account. In this way, the disadvantageous impact is indirectly causally connected to the protected characteristic. In other words, in the case of indirect discrimination, the causal link only appears when one considers its effects or takes into account information about the characteristics of the persons belonging to the protected group.

This delineation turns direct and indirect discrimination into mutually exclusive concepts, which enhances their applicability in practice. It is acknowledged that this theoretical delineation cannot change the reality that issues of proof can make it difficult in specific cases to know whether direct or indirect discrimination is involved. From a conceptual viewpoint, however, the delineation as proposed in this section produces two neatly distinguishable categories of discrimination.

3.2 Delineation of Direct v. Indirect Sex Discrimination in ECJ Case Law

The original equality provisions of European gender equality law prohibited 'discrimination' as such without referring to different types of discrimination.[22] From quite early on, however, the ECJ developed a two-tiered approach of direct and indirect discrimination, following the example of US and UK anti-discrimination law.[23]

Over time, the ECJ arrived at a particular understanding of direct discrimination that it continued to use for many years. According to this understanding, direct discrimination is present if the *fundamental reason* for the disputed treatment is one which *applies exclusively to one sex*.[24] This understanding of direct discrimination actually hinges on two thoughts, since it focuses not only on the underlying motive for a difference in treatment (*fundamental reason*) but also on its effects in practice (*applies exclusively to one sex*). This ambiguity reveals that the label of direct discrimination is not used exclusively for differences in treatment for which the underlying cause or motive is a person's sex.

First of all, the ECJ sometimes applies the qualification of direct sex discrimination in cases in which the disadvantage exclusively affects a protected group but is not based on or motivated by the person's sex and therefore does not involve a direct causal link. Pregnancy cases are a well-known example in this regard. According to a consistent line of practice of the ECJ, disadvantageous treatment on account of pregnancy or pregnancy-related characteristics constitutes direct discrimination of women, because it 'affects only women'.[25]

---

[22] S. Fredman, *Discrimination Law* (2002) at 93-94.

[23] For an extensive overview of this development, see C. Tobler, *Indirect Discrimination* (2005) at 101-277.

[24] Case C-177/88, *Dekker* v. *Stichting Vormingscentrum voor Jong Volwassenen*, [1990] ECR I-3941, para. 10; Case C-421/92, *Habermann-Beltermann* v. *Arbeiterwohlfahrt*, [1994] ECR I-1657, para. 14; Case C-25/02, *Katharine Rinke* v. *Ärtztekammer Hamburg*, [2003] ECR I-8349, para. 32.

[25] D. Schiek, L. Waddington and M. Bell (eds.), *Non-discrimination law* (2007) at 192-193; E. Ellis, *EU Anti-Discrimination Law* (2005) at 107. See, inter alia, Case C-177/88, *Dekker* v. *Stichting Vormingscentrum voor Jong Volwassenen*, [1990] ECR I-3941, para. 12; Case C-394/96, *Brown* v. *Rentokil*, [1998] ECR I-4185, para. 24; Case 207/98, *Mahlburg*, [2000] ECR I-549, para. 20; Case C-116/06, *Sari Kiiski* v. *Tampereen kaupunki*, [2007] ECR I-7643, para. 55.

A more recent case provides another clear example of this effects-based approach. *Nikoloudi*[26] concerned a rule reserving established staff positions only for persons with full-time jobs. The part-timers at the company were all women, as staff regulations made it possible only for women to obtain a part-time contract for the particular job category. The ECJ ruled that the rules for becoming an established staff member amounted to direct discrimination based on sex, even though the criterion for obtaining the established staff status was 'ostensibly neutral as to the worker's sex'. The determining factor for the Court was the fact that the measure impacted negatively on a category of workers that could only be composed of women.

The same effects-based reasoning is visible in *Maruko*, in which the ECJ considered that a rule granting survivor's pensions only to surviving spouses, thus excluding the category of 'life partners', constituted direct discrimination on grounds of sexual orientation.[27] This was remarkable, because the rule itself did not distinguish according to sexual orientation. The most obvious explanation for the ECJ's choice is the fact that, in German law, 'life partners' are necessarily partners of the same sex, which means that the criterion of being married excluded a category uniquely composed of homosexual persons.

Secondly, the ECJ sometimes employs the label of direct discrimination for cases in which there is a lack of attention for the special needs of particular vulnerable gender-related groups, even though there is no direct causal link with the persons' sex. In *Kiiski*, a woman requested interruption of the childcare leave she was enjoying, because she had become pregnant. The employer refused, because the relevant regulations did not allow for interruption of childcare leave on grounds of a new pregnancy. Even though this refusal was clearly not based on the gender of Mrs Kiiski or on her pregnancy, the ECJ still considered that the case amounted to direct discrimination on grounds of sex. It considered that the relevant provisions should have allowed for alteration of the childcare leave period in the case of a new pregnancy, since such a circumstance seriously influences the extent to which a mother can achieve the aims sought after by childcare leave.[28] Thus, the ECJ in fact considered the lack of provision for the special needs of pregnant women to amount to direct discrimination. Based on a similar argumentation, the ECJ also developed a principle of special consideration of the needs of transsexuals in the context of the prohibition of direct discrimination.[29]

Substantively speaking, it is possible to sympathise with the ECJ's choice to include in the category of direct discrimination disadvantageous treatment based on characteristics that are closely connected to a person's sex as well as certain omissions to provide for the special needs of vulnerable groups. However, the ECJ approach does not seem to be based on a clear understanding of the difference between direct and indirect discrimination. Rather than relying on a sound conceptual framework, the ECJ seems to distinguish between the two concepts by looking at the perceived seriousness of the particular case. This makes it very difficult to know when exactly to use which concept. The fact that the advocates general in *Nikoloudi* and *Maruko* used the qualification of indirect discrimination instead of direct discrimination is telling in this respect.[30]

---

[26] Case C-196-02, *Nikoloudi* v. *Organismos Tilepikinonion Ellados AE*, [2005] ECR I-1789, paras. 31-36.

[27] Case C-267/06, *Maruko* v. *Versorgungsanstalt der deutschen Bühnen*, [2008] ECR I-1757, paras. 65-73. The ECJ left the final word to the national court, however, stating that there would only be direct discrimination if that court were to find that national law treats spouses and life partners as comparable. For a discussion of the appropriateness of applying a comparability test, see section 4.3.4.

[28] Case C-116/06, *Sari Kiiski* v. *Tampereen kaupunki*, [2007] ECR I-7643, paras. 49-55.

[29] In Case C-423/04, *Richards* v. *Secretary of State for Work and Pensions*, [2006] ECR I-3585, paras. 27-38, a male-to-female transsexual claimed to have been discriminated against on grounds of sex because she was denied a retirement pension after having reached the age upon which other women received a pension. The ECJ acknowledged that the disadvantageous treatment was 'based on Ms Richards' inability to have the gender which she acquired following surgery recognised', and thus implicitly acknowledged that the fundamental reason for the denial of the pension was not her change of gender. Still, it considered that this lack of provision for the special situation of transsexuals constituted discrimination on grounds of sex, with which it apparently meant direct discrimination, since it did not mention or explore any objective justification possibilities.

[30] Opinion of Advocate General Stix-Hackl in *Nikoloudi*, 29 April 2004, para. 45; Opinion of Advocate

3.3 Practical Implications for the RED: A Potential Mismatch?

If anything, the above analysis makes clear that distinguishing between direct and indirect discrimination is a complex exercise. National courts will probably struggle to find the appropriate qualification for particular instances of discrimination when applying the RED. Even though it is clear that the ECJ's case law in the field of gender equality will not simply be transposed to the field of racial equality,[31] the apparent lack of a clear understanding of the difference between direct and indirect discrimination in the ECJ's gender case law at least raises the question whether a similarly incoherent approach will be taken with regard to the RED.

Imagine, for instance, a case coming up with regard to a rule requiring all persons with temporary residence permits to fulfil extra conditions in order to obtain a mobile telephone contract. Since the rule does not rely on a person's racial or ethnic origin as a fundamental reason, this is not direct discrimination. However, the exclusive and thus disproportionate impact on a particular group, namely persons not belonging to the majority ethnic group in society, suggests that this is an instance of indirect racial discrimination. Still, following the reasoning applied in the *Nikoloudi* case, one could argue that direct racial discrimination is involved, because the rule exclusively affects persons not belonging to the dominant ethnic group in society.

Another example might involve a claim by traveller communities that the local government systematically disregards their specific housing needs in its housing policy. The obvious qualification here would be indirect racial discrimination, given that there is no underlying racial cause or motive for the local government's neglect of the particular needs of this community. Smart lawyers, however, could find inspiration in cases such as *Kiiski* to argue that scant regard for the pressing needs of vulnerable ethnic communities constitutes direct racial discrimination.

Clearly, this lack of conceptual clarity is undesirable not only from the point of view of legal certainty but also in view of the need for a uniform standard of non-discrimination across the European Union. It is therefore important that a coherent, workable conceptual framework is adopted for the RED. Having such a framework would at the same time avoid the second (potential) mismatch identified here. Indeed, a proper application of the substantive concepts used in the RED undoubtedly furthers effective protection against racial discrimination.

3.4 The Feryn Case as an Illustration of the Conceptual Confusion over Direct and Indirect Discrimination

The *Feryn* case – in particular the questions posed by the national court – illustrates the difficulty national courts have in determining the exact dividing line between direct and indirect discrimination. The Belgian court referring the case to the ECJ asked several questions, including:

(4) What is to be understood by 'facts from which it may be presumed that there has been direct or indirect discrimination' within the terms of Article 8(1) of Directive 2004/43? How strict must a national court be in assessing facts which give rise to a presumption of discrimination?

(a) To what extent do earlier acts of discrimination (public announcement of directly discriminatory selection criteria in April 2005) constitute 'facts from which it may be presumed that there has been direct or indirect discrimination' within the terms of Article 8(1) of [Directive 2000/43]? …

(d) Does the fact that an employer does not employ any fitters from ethnic minorities give rise to a presumption of indirect discrimination when that same employer some time previously had experienced great difficulty in recruiting fitters and, moreover, had also stated publicly that his customers did not like working with fitters who were immigrants? …

(f) Having regard to the facts in the main proceedings, can a presumption of discrimination on the part of the employer be inferred from the recruitment of exclusively indigenous fitters by an affiliated company of that employer?.[32]

General Colomer in *Maruko*, 6 September 2007, para. 102; Opinion of Advocate General Kokott in *Kiiski*, 15 March 2007, paras. 31-47.

[31] K.A.M. Henrard, *Equal rights versus special rights? Minority protection and the prohibition of discrimination* (2007) at 22.

[32] The most relevant parts of the extensive questions submitted by the national court read as follows:

These questions attest to a lack of clarity concerning the distinction between the two concepts. The national court seemingly assumed that mere speech in itself was not sufficient to identify an instance of some form of discrimination and thus attempted to identify relevant 'practice'. This proved to be complicated, however, because there were no actual victims available. The court subsequently found it very hard to translate the facts of the case into the frame of either direct or indirect discrimination. In view of the profound uncertainty visible in the questions of the national court about the dividing line between direct and indirect discrimination, it is unfortunate that the ECJ did not explicitly clarify this distinction. At most, it could be argued that the Court provided an implicit answer, since its response to the first and second questions only refers to direct discrimination (paras. 22-26).

A proper conceptual understanding of the distinction between direct and indirect discrimination would have been furthered if the Court had clarified that, once an employer has stipulated explicitly that it does not want to employ people from a particular ethnic origin (and thus because of this ethnic origin), a direct causal link is established with the protected ground. In such a clear instance of direct racial discrimination, there would be no need to consider subsequent practice or the particular effects of the announcement on a particular ethnic group, as one would have done in order to establish indirect discrimination.

When one is serious about qualifying a public statement about recruitment policy (selection criteria) as a (possible) instance of discrimination because of its strong dissuasive force, one should keep this separate from the assessment of actual recruitment practice. Even if an employer were to hire one or two persons belonging to the ethnic or racial group in question, this would not undo the dissuasive force of the public statement, which would continue to resonate.

Hence, in order to be consistent in terms of the reading of the concept direct discrimination and to enhance conceptual clarity for the national courts, the ECJ should have distinguished between two different possible instances of discrimination in the *Feryn* case: one in relation to the statement as such (the 'speech' instance) and one in relation to the actual recruitment actions (the 'practice' instance).

By not consistently distinguishing between discriminatory speech and (possible) discriminatory practice, the ECJ left the questions of the national court about indirect discrimination (relating to the impact and effects and thus actual practice) unanswered. Hence, the ECJ did not reduce the uncertainty of the national court about the respective reach of direct and indirect discrimination and thus missed an opportunity to further develop an effective protection against discrimination.

---

(1) Is there direct discrimination within the meaning of Article 2(2)(a) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin where an employer, after putting up a conspicuous job vacancy notice, publicly states: "I must comply with my customers' requirements." …

(4) … (b) Does an established act of discrimination in April 2005 (public announcement in April 2005) subsequently give rise to a presumption of the continuation of a directly discriminatory recruitment policy? Having regard to the facts in the main proceedings, is it sufficient, in order to raise the presumption (that an employer operates and continues to pursue a discriminatory recruitment policy) that, in April 2005, in answer to the question whether, as an employer, he did not treat people from foreign and indigenous backgrounds in the same manner and was thus actually a bit racist, he publicly stated: "I must comply with my customers' requirements." …

(d) Does the fact that an employer does not employ any fitters from ethnic minorities give rise to a presumption of indirect discrimination when that same employer some time previously had experienced great difficulty in recruiting fitters and, moreover, had also stated publicly that his customers did not like working with fitters who were immigrants? ….

4 Mismatch III: Substantive v. Enforcement Provisions

4.1 Direct v. Indirect Discrimination and the Allocation of the Burden of Proof

Effective protection against discrimination requires, inter alia, an appropriate translation of the substantive concepts of discrimination into procedural terms. One of the most important cornerstones of effective protection in terms of enforcement is a satisfactory regime for the proof of direct or indirect discrimination that does not impose an undue burden on the claimant (alleged victim).[33]

Article 8 of the RED stipulates a special rule for the allocation of the burden of proof in racial discrimination cases, stemming from the case law of the ECJ on gender discrimination.[34] Pursuant to this rule, the applicant must first 'establish … facts from which it may be presumed that there has been direct or indirect discrimination'. Once the presumption of discrimination has been established, 'it shall be for the respondent to prove that there has been no breach of the principle of equal treatment'. The applicant therefore only has to establish a presumption of either direct or indirect discrimination. As soon as he has done so, it is for the respondent to prove that no discrimination has taken place. As this definition itself indicates, the special allocation of the burden of proof creates two phases. These phases can serve as a basis for a theoretical review model. One can refer to the first phase of this model as the prima facie phase and the second phase as the refutation phase.

Although neither this definition nor the two phases seem particularly complicated, it remains unclear in theory as well as in the case law of the ECJ what these phases actually entail when taken together with the concepts of direct and indirect discrimination. In practice, the lack of conceptual clarity concerning the review model results in a mismatch between the substantive concepts and the allocation of the burden of proof.

4.1.1 The Prima Facie Phase

Pursuant to Article 8 of the RED, the applicant shall establish facts from which it may be presumed that there has been (direct or indirect) *discrimination*. Nevertheless, it remains unclear what it takes to establish a prima facie case of discrimination, and the case law of the ECJ does not provide a helping hand in this respect. The case law of the ECJ only illuminates that statistics can establish a presumption of discrimination[35] and that this presumption can be established with the help of comparisons.[36] As these explanations do not provide much clarity, one can only turn to the concept(s) of discrimination in order to identify relevant markers for a presumption of discrimination.

The concept of discrimination arguably entails that there is a causal link between the harm and the protected ground as well as between the behaviour complained of and the harm. As far as these causal relationships are concerned, as explained above, a

---

[33] See, inter alia, O. De Schutter, 'Methods of Proof in the Context of Combating Discrimination' in J. Cormack (ed.), *Proving Discrimination – The Dynamic Implementation of EU Anti-Discrimination Law: The Role of Specialised Bodies* (2003) at 23; M.H.S. Gijzen, *Selected Issues in Equal Treatment Law: A Multi-layered Comparison of European, English and Dutch Law* (2006) at 73; F. Palmer, 'Re-dressing the Balance of Power in Discrimination Cases: The Shift in the Burden of Proof' (2006) *European Anti-Discrimination Law Review* 23 at 23; O.M. Arnardóttir, 'Non-discrimination under Article 14 ECHR: The Burden of Proof' (2007) 51 *Scandinavian Studies in Law* 13 at 16.

[34] See, inter alia, Case 109/88, *Handels- og Kontorfunktionærernes Forbund I Danmark* v. *Dansk Arbejdsgiverforening, acting on behalf of Danfoss*, [1989] ECR 3199; Case C-243/95, *Kathleen Hill and Ann Stapleton* v. *The Revenue Commissioners and Department of Finance*, [1998] ECR I-3739; Case C-127/92, *Dr. Pamela Mary Enderby* v. *Frenchay Health Authority and Secretary of State for Health*, [1993] ECR I-5535; Case C-237/94, *John O'Flynn* v. *Adjudication Officer*, [1996] ECR I-2617.

[35] Case C-127/92, *Dr. Pamela Mary Enderby* v. *Frenchay Health Authority and Secretary of State for Health*, [1993] ECR I-5535; Case C-237/94, *John O'Flynn* v. *Adjudication Officer*, [1996] ECR I-2617.

[36] See, for instance, Case C-226/98, *Birgitte Jørgensen* v. *Foreningen af Speciallæger and Sygesikringens Forhandlingsudvalg*, [2000] ECR I-02447, para. 29.

clear distinction needs to be made between cases of direct and indirect discrimination. In cases of direct discrimination, the less favourable treatment is directly based on the victim's protected characteristic, while in cases of indirect discrimination a particular disadvantage is or can be 'merely' related to a protected characteristic. This conceptual distinction entails that, in cases of indirect discrimination, a disparate impact (particular disadvantage) on a group immediately establishes a presumption of an indirect causal link between the protected ground and the harm. For instance, a regulation that requires a person to wear a helmet when riding a motorcycle can have a disparate impact on the Sikh community, whose male members wear turbans. Common knowledge and/or statistics concerning the disparate impact on this minority group could help to establish an indirect causal link. Conversely, in direct discrimination cases, the applicant should focus on providing some indication that the underlying reason or motive for the behaviour complained of was the protected characteristic. In the case of refusal to serve persons of Roma origin in a restaurant, for instance, situation testing can be carried out. If the treatment of members of non-Roma groups turns out to be markedly different to the treatment of members of the Roma group (while the members of both groups are similar in all other respects), this would help to establish a presumption that there is a causal link between the treatment (refusal) and the protected characteristics (Roma origin).

Due to the lack of clarity about the concepts of discrimination and the review model, there is a potential danger that fact-finders will not make a distinction between the concepts of direct and indirect discrimination when applying the review model. The lack of adaptation of the concepts to this procedural provision and the lack of conceptual clarity as to what presumption means can result in the following mismatches. First of all, in direct discrimination cases, fact-finders can require more than simply a presumption, expecting victims to prove that the respondent had the intent to discriminate. In the case of refusing to serve Roma people, this would mean that the fact-finder would require the applicant to prove that the owner of the restaurant had the intent to discriminate against the Roma. In cases of covert direct discrimination it is almost impossible to prove this. Secondly, in indirect discrimination cases, fact-finders might require the applicant to prove or at least make it very credible that the challenged measures were based on his protected characteristic instead of simply establishing that they had a disproportionate impact on the group to which he belongs. Taking the example of the regulation requiring motorcyclists to wear helmets, it would be conceptually incorrect if fact-finders were to look for evidence of the existence of an intent to discriminate against Sikhs, as they only need to establish that the rule disproportionately affects this minority group.

Insisting on the need to prove the existence of a causal link instead of establishing a 'mere' presumption of such a link in an alleged case of direct discrimination and insisting on the need to establish a presumption of the kind belonging to the concept of direct discrimination in an alleged case of indirect discrimination can result in mismatches that hamper effective protection against discrimination.

4.1.2 The Refutation Phase

As soon as the applicant establishes facts that give rise to a presumption of discrimination, the burden of proof is placed on the respondent. More precisely, the respondent's burden of proof is created by the establishment of a prima facie case of discrimination. In the refutation phase, the respondent bears the burden of persuading the fact-finder that he has observed the principle of equal treatment.

In the case law of the ECJ, the respondent's burden of proof is interpreted as (objective) justification.[37] However, based on the concepts of discrimination, it can be argued that in conceptual terms this phase of the assessment includes another stage prior to objective justification, namely the stage of negation of the causal link.

[37] See, inter alia, Case 109/88, *Handels- og Kontorfunktionærernes Forbund I Danmark v. Dansk Arbejdsgiverforening, acting on behalf of Danfoss*, [1989] ECR 3199, paras. 16 and 22-23; Case C-243/95, *Kathleen Hill and Ann Stapleton* v. *The Revenue Commissioners and the Department of Finance*, [1998]

Since the existence of the causal link is only at the level of presumption (established by the applicant) at the end of the prima facie phase, it could be argued that, in order to refute the allegation of discrimination, the respondent should first attempt to negate the causal link between the harm and the protected characteristic. If he is not able to negate this link, the defendant can come up with an objective justification.[38] The claim that there is no causal link relates to the question whether a distinction has been made on the grounds of the victim's racial or ethnic origin, while the claim that there is an objective justification pertains to the question whether the distinction based on or related to the protected characteristic is lawful, that is to say, whether or not the distinction constitutes discrimination.

As mentioned above, the conceptual distinction between direct and indirect discrimination influences the respondent's ability to use the distinctive stages of the refutation phase. In cases of direct discrimination, the respondent's ability to rely on objective justification is limited, as the RED only allows very few exceptions to the prohibition of direct discrimination. However, he can try to negate the causal link by showing that the actual reason or motive for the behaviour complained of was not the victim's racial or ethnic origin. In contrast, in cases of indirect discrimination, there is more scope for objective justification, but it is almost impossible to negate the causal link (i.e., the disparate impact on the protected group). The impossibility of negating the causal link in cases of indirect discrimination is due to the fact that the question whether a particular measure has a disparate impact on a group is a question of fact and not of presumption.

The lack of a sound translation of the concepts of discrimination in terms of the review model can have serious practical implications. For instance, in an alleged case of direct discrimination, the argument of a restaurant owner that his refusal to serve people of Roma origin is based on their non-compliance with the dress-code would generally be understood as a claim of justification ('I had a very good reason not to serve them'). In actual fact, the owner is trying to negate the causal link between his refusal and the customers' Roma origin ('It was not because of their Roma origin that I did not serve them'). The flawed understanding of the different stages of the review model can result in incorrect findings of discrimination because the negation of the causal link as put forward by the respondent is not considered or accepted. In view of the meagre possibilities for justifying direct discrimination in the RED, the denial of the negation stage almost certainly leads to a conclusion of prohibited discrimination. Only if a respondent can show that the claimant's ethnic or racial origin constituted a genuine and determining occupational requirement or that he was applying a positive action scheme, will his differentiation on the basis of racial or ethnic origin be accepted.

This conceptually incorrect approach thus affects the defence position of the respondent, who has fewer possibilities to refute the alleged direct discrimination. Realising this, fact-finders may try to redress this imbalance, for example by imposing a heavier burden of proof on the applicant concerning the causal link. In practice, this heavier burden would mean that the applicant needs to prove the existence of discrimination instead of merely establishing a presumption thereof. This would clearly contradict the aim of the RED to lighten the burden of proof for the applicant.

In order to ensure effective protection against discrimination, the above-mentioned mismatches should be avoided, first and foremost, by adapting the two phases of the allocation of the burden of proof to the concept of discrimination at hand. Moreover, the theoretical review model elaborated above should be followed by fact-finders when assessing alleged cases of racial discrimination. Finally, the ECJ should provide more clarity on the implications of these phases of the assessment. This clarification would also assist national (quasi-)judicial bodies in their deliberation of cases.

ECR 1-3739, para. 43; Case C-17/05, *B. F. Cadman* v. *Health and Safety Executive*, [2006] ECR I-09583, para. 31.

[38] C. Tobler, *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law* (2005) at 69.

4.2 The Feryn Case as a Manifestation of the Flawed Translation of the Concepts of Discrimination in Terms of the Allocation of the Burden of Proof

In the *Feryn* case, the ECJ failed to properly transpose the interpretation of the concept of discrimination that it had adopted to the domain of the special allocation of the burden of proof and the related review model. The national court asking the preliminary questions was clearly unsure about how to apply the special allocation of the burden of proof and, more particularly, the application of the 'presumption of discrimination' concept. By asking whether the same constellations of fact amounted to discrimination and also to a presumption of discrimination, the national court manifested its profound confusion about how a finding of discrimination is related to the establishment of a presumption of discrimination.

The ECJ failed to dispel these uncertainties and instead increased the confusion by qualifying a *public statement* revealing a discriminatory recruitment policy both as a presumption of discrimination and as prohibited discrimination in itself without explicitly applying the review model and without explaining the respective qualifications in this context.

In paragraph 28 of its judgment, the ECJ explicitly states that 'the fact that an employer states publicly that it will not recruit employees of a certain racial or ethnic origin *constitutes* direct discrimination in respect of recruitment within the meaning of Article 2(2)(a) of Directive 2000/43' (emphasis added). The Court subsequently stipulates in paragraph 31 that the statements concerned '*may* constitute facts of such a nature as to give rise to a *presumption* of a discriminatory recruitment policy' (emphasis added). Hence, what a few paragraphs earlier is said to *constitute* direct discrimination, is now possibly merely a *presumption* of discrimination.

It is commendable that the ECJ uses the term 'presumption', thus attempting to apply elements of the review model. However, the Court should have acknowledged that, in this particular factual setting, the public statement actually amounts to full proof of overt direct discrimination. Furthermore, in order to provide further insights into the way in which a 'speech' instance of discrimination relates to the review model, the ECJ could have pointed out that, even if one were to merely regard the public statement as a presumption, this presumption could neither be negated nor justified as an exception. Indeed, the public statement precludes a negation of the causal link, since the causal link was made explicitly and in public by the employer himself. Consequently, one should check the 'system' inherent in the RED for possible exceptions. Clearly, none of the very limited exceptions included in the RED are applicable, since the statement can be considered neither a genuine and determining occupational requirement (Article 4) nor a measure of positive action (Article 5). Hence, one is forced to conclude that this constitutes an instance of prohibited direct racial discrimination.

Interestingly, the statement that in itself constitutes direct discrimination is also relevant for the subsequent assessment of the *recruitment practice* of the employer (as a separate potential instance of discrimination). More specifically, the public statement on recruitment policy could be regarded as establishing a presumption of discrimination in relation to the recruitment practice of the employer. If he says that he will discriminate, one can presume that he will do so. This presumption could still be rebutted by proof that the actual practice of the employer is not racially discriminatory, but this would be difficult to prove. For instance, showing that one person from a minority ethnic background has been employed by the employer would arguably not be sufficient, as this would not necessarily prove that racially discriminatory motives had not played a role in other instances or even in the great majority of instances. This also implies that it would be inappropriate (incorrect) to determine a particular percentage of personnel that should be from an ethnic background in order to rebut a presumption of the 'practice' instance of discrimination. At the same time, it seems unreasonable to demand a review of all recruitment decisions ever taken.

The ECJ arguably has a long way to go to apply the review model correctly and to make sure that the distinct concepts of discrimination are always properly translated in

terms of the special allocation of the burden of proof and the related review model. This is not only important for the coherence of the Court's own case law but will also provide the required clarification and guidance for national courts.

5 Conclusion

A general conclusion that can be drawn from the preceding analysis is that the success of a particular instrument in terms of the effective protection that it offers against discrimination depends as much on the coherence of the substantive and enforcement provisions in the text of the instrument as on the sound and coherent interpretation and application of those provisions. This implies a need for suitably broad enforcement provisions, so that they match teleological interpretations of substantive provisions. Furthermore, as regards the second and third potential mismatch identified in this article, the adopted interpretation must include a proper and consistent delineation of the substantive concepts as well as an appropriate translation of these concepts in terms of the enforcement provisions. The ECJ remedied the first mismatch through its generous interpretation of the 'flawed' enforcement provision (on legal standing), in order to bring it into line with its teleological interpretation of the concept of 'direct discrimination'. Unfortunately, it has failed to avoid the two other mismatches, which are the result of a flawed interpretation and application of the substantive provisions outlawing discrimination. Indeed, the ECJ has not provided conceptual clarity concerning the substantive provisions or concerning the two phases of the review model and their translation in terms of the substantive provisions. Consequently, it has failed to realise the most effective protection possible against discrimination.

As regards the Racial Equality Directive, it is essential that the ECJ, in view of its special position as the ultimate interpreter and guardian of the unity of EU law, takes up its task of ensuring this 'match', while providing adequate guidance to the national courts. In this respect, it is to be hoped that the Court's willingness to avoid mismatches between substantive law and its application will manifest itself more generally in the future. Scholars arguably also have a role to play in identifying mismatches and offering suggestions on how to remedy them, but in the end it is up to the courts, and the ECJ in particular, to ensure that the procedural framework of the Directive and the interpretation and application of its provisions work together to ensure the most effective protection possible against racial discrimination.