INDIRECT DISCRIMINATION

A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law

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The concept of discrimination must be interpreted on the basis of factual criteria. A purely theoretical idea is not sufficient. (The Commission in *Sotgiu*, 1974)

Nothing is more fascinating and at the same time more deceptive than equality, and justice is often based on inequality; all this is well known. (Advocate General Lagrange in *Italian Refrigerators*, 1963)
This book is an updated and restructured version of a habilitation thesis submitted in the summer of 2003 to the Law Faculty of the University of Basel, Switzerland. In German speaking Switzerland, the habilitation is a prerequisite for eligibility for what are termed ordinary professorships. Under the traditional habilitation system, a candidate must first submit a written thesis on a topic of personal expertise. Once such a thesis has been approved, a candidate must present and defend an oral address in a separate subject area. The habilitation thesis and oral presentation together determine the range of subjects which the candidate will be entitled to teach once the habilitation procedure has been successfully completed (the so-called venia legendi). In my case, the written habilitation thesis concerned the development of the legal concept of indirect discrimination under both EC law and Swiss sex equality law. The oral presentation addressed the liberalization of the Swiss electricity market.

In Switzerland, habilitation theses are published only after successful completion of the habilitation procedure. I am grateful to the Law Faculty of Basel University and in particular to Prof. Anne Peters for their support and help throughout this rigorous procedure. I am also very grateful to Prof. Ingeborg Schwenzer whose efforts enabled me to come to Basel from The Netherlands where I was living and working at a time when I had no formal links with any Swiss university. Without her assistance, in all likelihood I would not have undertaken my habilitation in Basel nor served in my present capacity at the University’s Europe Institute.

As originally submitted, my habilitation thesis was written in English. Also written in English, this book presents to the greater public-at-large those aspects of my thesis which specifically concern EC law. However, in the near future I intend to publish the chapter that deals specifically with Swiss law in a German language version. Since English is not my mother tongue, I enlisted the assistance of a native speaker to perform the various tasks involved in the language editing of this present publication. I have enjoyed the support of Sylvester (Danny) Ryan who dedicates himself to helping non-native English speakers express themselves in law. Indeed, his grounding in both language and EC law contributed significantly to my efforts to express myself clearly in this book. For that I am truly grateful to him.

When I undertook the study of law in Switzerland in the early 1980s, EC law was not a well established part of the university legal curriculum. In fact, I only began my formal study of EC law during the academic year 1993/1994 as a participant of The Leiden LL.M. Programme in EC Law. That same academic year I also gained a thorough grounding in equality and discrimination law through courses offered by
the (then in existence) Department on Women and the Law (afdeling vrouw en recht) of the Law Faculty of Leiden University. The coursework that I was privileged to take in Leiden laid the groundwork for the analyses which I have undertaken in this book. Thus, I would like to express my heartfelt thanks to all my Leiden teachers, but particularly to Prof. Rikki Holtmaat (Professor of International Non-Discrimination Law at the Leiden Law Faculty), Dr. Bob Lane (of Edinburgh University and my teacher in the important Basic Course of the Leiden LL.M. Programme) and Prof. Piet Jan Slot (Director of the Europa Institute of the Leiden Law Faculty). After the completion of my LL.M. studies at Leiden, Prof. Slot enabled me to return to the Europa Institute and to work for The Leiden LL.M. Programme in EC Law. I have benefitted enormously from my continued close association with Leiden, particularly with regard to my knowledge of EC law. In the framework of my position with Leiden University, the work done for this present study was part of the E.M. Meijers Institute’s research programme ‘Securing the rule of law in a world of multilevel jurisdiction: coherence, institutional principles and fundamental rights’ and, more specifically, of the sub-programme ‘The protection of fundamental rights in an integrating Europe’.

Finally, my education, my habilitation and the publication of this book would not have been possible without the love, care and continued support of family and friends, particularly of my parents, Ruth and Theophil Tobler-Pulfer, and of my partner, Jacques Beglinger. They have been and continue to be a blessing to me. It is to them that I dedicate this book – though in the case of my mother, I must do so ‘in loving memory’.

Basel and Leiden, March 2005

Christa Tobler
TABLE OF CONTENTS

FOREWORD ............................................................... vii

ABBREVIATIONS ...................................................... xxiii

PART ONE:
INTRODUCTION AND BACKGROUND ................................. 1

A. SUBJECT AND METHODOLOGY OF THE STUDY ............... 3

I. ON THE SUBJECT .................................................. 3
1. Introducing indirect discrimination ............................... 3
2. Why a study on indirect discrimination? ......................... 4
3. A study on EC law ................................................ 5
4. The two main research questions ................................. 7
   a. The development of the legal concept of indirect discrimination 7
   b. The place of the concept in today’s EC law .................. 8
II. ON METHOD ...................................................... 11
1. A legal and conceptual analysis essentially based on case law 11
2. A note on materials, language and reference to EC law provisions 12
3. Set-up of the study .............................................. 14

B. PARAMETERS ....................................................... 15

I. INTRODUCTORY REMARKS ..................................... 15
II. EQUALITY ....................................................... 17
1. Equality before the law and in the law .......................... 17
   a. The concepts ................................................ 17
   b. Equality in the law: an ‘Aristotelian’ notion ................ 19
      i. The Aristotelian formula ................................. 19
      ii. Aristotelian equality – An empty shell? ............... 21
   c. The Aristotelian approach in EC law ....................... 22
2. Formal and substantive equality ................................. 25
   a. The concepts ................................................ 25
Table of Contents

b. In EC law .................................................. 26
   i. A formal starting point ................................... 26
   ii. Substantive equality in EC law .......................... 28
3. Equality of opportunity .......................................... 31
   a. The concept ................................................ 31
   b. In EC law .................................................. 32
   c. Specifically: positive equality obligations in EC law .............. 34
4. Some remarks on the function of equality in EC law .................. 35
   a. The economic (competition) perspective ........................ 35
   b. The social (human rights or solidarity) perspective ............. 38
III. DISCRIMINATION ............................................. 40
1. Introductory remarks ............................................ 40
2. The general concept of discrimination .............................. 41
3. Comparability as a precondition for a finding of discrimination ...... 43
   a. The importance of comparability ................................ 43
   b. The assessment of comparability in EC law ........................ 45
   c. Exceptions where comparability is not a precondition in EC law ... 46
   i. Pregnancy discrimination ...................................... 46
   ii. Discrimination through harassment ........................... 48
4. Important forms of non-discrimination provisions .................... 49
   a. Open and closed non-discrimination provisions ......................... 50
   b. Symmetric and asymmetric non-discrimination provisions ........... 52
5. Specific notions of discrimination ....................................... 54
   a. Introductory remarks ........................................ 54
   b. Direct and indirect discrimination ................................ 55
   i. Direct discrimination ........................................ 56
   ii. Indirect discrimination ...................................... 57
   iii. Discrimination \textit{sui generis} prohibited under EC law? ........... 59
   c. Structural discrimination ..................................... 61
   d. Specifically in EC law: discrimination in form and in substance ... 63
   e. Factual discrimination ........................................ 64
      i. The concept ............................................... 64
      ii. The relevance of the law's limited field of application ........... 65
      iii. In particular: limited number and reach of discriminatory grounds ........................................... 67
6. Justification for discrimination ....................................... 69
   a. The concept ................................................ 69
   b. Derogations in form or in substance? .............................. 69
   c. Absolutely and relatively worded provisions ........................ 71
   d. Justification and scope ...................................... 72
   e. Justification and objective differences (comparability) ............ 73
IV. RESTRICTIONS IN A WIDER SENSE ........................................ 75
  1. The concept ......................................................... 75
  2. Development and relevance in the context of this present study ..... 76
V. WHAT IS AN EQUALITY OR NON-DISCRIMINATION RULE
   FOR THE PRESENT PURPOSES? ......................................... 77
  1. Relevant types of rules .............................................. 77
     a. Only substantive rules directly prohibiting discrimination .... 77
     b. Only equality and non-discrimination provisions in a strict sense . 78
        i. Included provisions and areas of law .......................... 78
        ii. Not the basic Treaty provisions on free movement of goods .... 79
        iii. Not competition law ........................................ 83
  2. Analytical tools for analysing non-discrimination and equality
     provisions .......................................................... 83
VI. SUMMARY OF THE MOST IMPORTANT POINTS ....................... 85
  1. Equality ........................................................... 85
  2. Discrimination ...................................................... 86
  3. Restrictions in a wider sense ....................................... 87

C. HISTORICAL PRECURSORS OF THE CONCEPT OF INDIRECT
   DISCRIMINATION ................................................... 89

I. HISTORIC ORIGINS IN PUBLIC INTERNATIONAL LAW ............. 89
II. THE ‘DISPARATE IMPACT’ DOCTRINE IN U.S. LAW ............... 91
  1. Introduction through case law ..................................... 91
     a. Early indications .................................................. 91
  2. Introducing a legal definition through the Civil Rights Act 1991 ....... 94
III. EUROPEAN PRECURSORS: UK AND IRISH LAW .................. 95
IV. THE FIRST EXPLICIT REFERENCE IN THE LAW OF THE
   EUROPEAN COMMUNITIES: GEITLING .......................... 96

PART TWO:
THE DEVELOPMENT OF THE LEGAL CONCEPT OF INDIRECT
DISCRIMINATION IN EC LAW ............................................ 99

A. THE DEVELOPMENT THROUGH CASE LAW ......................... 101

I. RECOGNITION OF THE POSSIBILITY THAT DISCRIMINATION
   CAN BE OF AN INDIRECT NATURE ............................... 101
1. Introductory remarks .......................................................... 101
2. The foundational cases: introducing the idea of indirect discrimination . 104
   a. Free movement of workers: *Ugliola* ...................................... 104
      i. The case ................................................................. 104
      ii. Comments ............................................................ 105
   b. The general principle of non-discrimination on grounds of sex: *Sabbatini* ................................................................. 107
      i. The case ................................................................. 107
      ii. Comments ............................................................ 108
   c. *Sotgiu*, a landmark case on discrimination on grounds of nationality ................................................................. 110
      i. The case ................................................................. 111
      ii. Comments ............................................................ 113
   d. An interim conclusion (I) ................................................ 115
3. A complicated but necessary excursion: the *Defrenne II* distinction in relation to direct effect ................................................................. 116
   a. The case ................................................................. 116
   b. Comments ............................................................... 118
      i. Para. 18: ‘indirect discrimination’ as related to direct effect ... 118
      ii. Para. 19, 48 and 60: a trace of a substantive notion of indirect discrimination ................................................................. 121
   c. An interim conclusion (II) ................................................ 121
4. Application of the concept in an enlarging context ................................................................. 122
   a. Internal taxation of goods .................................................... 122
      i. Preliminary remarks ...................................................... 122
      ii. Indirect discrimination: a general statement in *Steinike & Weinlig* ................................................................. 124
      iii. In search of application in concrete cases ......................... 125
   b. Freedom of establishment .................................................. 128
      i. A general statement in *Thieffry* ...................................... 128
      ii. Concrete application: *Data-processing contracts* ............... 129
   c. An interim conclusion (III) ............................................... 130
   d. Agricultural law ............................................................. 131
      i. Preliminary remarks ...................................................... 131
      ii. *Sea Fisheries*: the case ............................................. 131
      iii. Comments ............................................................. 133
   e. Social security in the context of free movement ....................... 134
      i. Preliminary remarks ...................................................... 134
      ii. A general statement: *Kenny* ........................................ 136
      iii. The Court’s case law: *Palermo-Toia* .............................. 136
<table>
<thead>
<tr>
<th>Section</th>
<th>Title and Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>f.</td>
<td>Indirect discrimination in the context of Art. 12(1) EC (general prohibition of discrimination on grounds of nationality) .................................................. 138</td>
</tr>
<tr>
<td>f.i.</td>
<td>Preliminary remarks .................................................. 138</td>
</tr>
<tr>
<td>f.ii.</td>
<td>Boussac ................................................................. 139</td>
</tr>
<tr>
<td>g.</td>
<td>An interim conclusion (IV) .................................................. 140</td>
</tr>
<tr>
<td>h.</td>
<td>Sex equality law outside staff law: Art. 119 of the EEC Treaty and the Equal Treatment Directives .................................................. 141</td>
</tr>
<tr>
<td>h.i.</td>
<td>Preliminary remarks .................................................. 141</td>
</tr>
<tr>
<td>h.ii.</td>
<td>Jenkins: the case ..................................................... 141</td>
</tr>
<tr>
<td>h.iii.</td>
<td>Comments .............................................................. 144</td>
</tr>
<tr>
<td>h.iv.</td>
<td>Bilka: the case ....................................................... 146</td>
</tr>
<tr>
<td>h.v.</td>
<td>Comments .............................................................. 148</td>
</tr>
<tr>
<td>i.</td>
<td>An interim conclusion (V) .................................................. 150</td>
</tr>
<tr>
<td>j.</td>
<td>Free movement of services .................................................. 151</td>
</tr>
<tr>
<td>j.i.</td>
<td>Preliminary remarks .................................................. 151</td>
</tr>
<tr>
<td>j.ii.</td>
<td>The Seco case .......................................................... 153</td>
</tr>
<tr>
<td>j.iii.</td>
<td>Comments .............................................................. 154</td>
</tr>
<tr>
<td>k.</td>
<td>Transport law ............................................................. 156</td>
</tr>
<tr>
<td>k.i.</td>
<td>Preliminary remarks .................................................. 156</td>
</tr>
<tr>
<td>k.ii.</td>
<td>Corsica Ferries Italia: the case ...................................... 157</td>
</tr>
<tr>
<td>k.iii.</td>
<td>Comments .............................................................. 158</td>
</tr>
<tr>
<td>l.</td>
<td>An interim conclusion (VI) .................................................. 160</td>
</tr>
<tr>
<td>m.</td>
<td>What about free movement of capital? .................................................. 161</td>
</tr>
<tr>
<td>m.i.</td>
<td>Preliminary remarks .................................................. 161</td>
</tr>
<tr>
<td>m.ii.</td>
<td>Under the old regime: the example of Svensson and Gustavsson .............................. 164</td>
</tr>
<tr>
<td>m.iii.</td>
<td>Under the new regime: Trummer and Mayer .................................................. 166</td>
</tr>
<tr>
<td>n.</td>
<td>An interim conclusion (VII) .................................................. 167</td>
</tr>
<tr>
<td>5.</td>
<td>Application of the general rules in two specific contexts .................................................. 168</td>
</tr>
<tr>
<td>a.</td>
<td>Public procurement ...................................................... 168</td>
</tr>
<tr>
<td>a.i.</td>
<td>Preliminary remarks .................................................. 168</td>
</tr>
<tr>
<td>a.ii.</td>
<td>Beentjes: the case ..................................................... 170</td>
</tr>
<tr>
<td>a.iii.</td>
<td>Comments .............................................................. 171</td>
</tr>
<tr>
<td>b.</td>
<td>Direct (income) taxation .................................................. 172</td>
</tr>
<tr>
<td>b.i.</td>
<td>Preliminary remarks .................................................. 172</td>
</tr>
<tr>
<td>b.ii.</td>
<td>Habitual residence in Biehl: the case .................................. 173</td>
</tr>
<tr>
<td>b.iii.</td>
<td>Comments .............................................................. 174</td>
</tr>
<tr>
<td>b.iv.</td>
<td>Fiscal or tax residence in Commerzbank: the case .................................................. 175</td>
</tr>
<tr>
<td>b.v.</td>
<td>Comments .............................................................. 176</td>
</tr>
<tr>
<td>c.</td>
<td>An interim conclusion (VIII) .................................................. 178</td>
</tr>
<tr>
<td>6.</td>
<td>Summary and conclusion .................................................. 178</td>
</tr>
</tbody>
</table>
# Table of Contents

II. OBJECTIVE JUSTIFICATION ............................................................. 183

1. Introductory remarks ................................................................. 183

2. Early developments ....................................................................... 184
   a. *Ugliola* and *Sabbatini*: a strict approach ................................. 184
      i. *Ugliola* ........................................................................ 184
      ii. *Sabbatini* ................................................................. 185
   b. Objective differences: *Sotgiu* (and later case law) .................... 186
   c. The special approach in *Boussac*: avoiding the disadvantage ...... 187

3. Objective justification in sex equality law .................................... 190
   a. A new approach in *Jenkins* ................................................ 190
      i. The case .................................................................... 190
      ii. Comments ............................................................... 191
   b. From *Bilka* to *Rinner-Kühn* ............................................ 194

4. Towards objective justification in other areas .............................. 196
   a. Indirect discrimination on grounds of nationality: first indications . 196
      i. *Seco* ........................................................................ 196
      ii. *Data-processing contracts* ......................................... 198
   b. Steps on the way according to the Court .................................... 199
      i. *Bachmann* ............................................................... 199
      ii. *Commission v Luxembourg* ...................................... 200
      iii. *Allué II* .................................................................. 201
   c. Discrimination on grounds of nationality: the general statement
      in *O’Flynn* .................................................................. 202
      i. The case .................................................................... 203
      ii. Comments ............................................................... 203

5. Findings and conclusion ............................................................... 204

III. SOME BASIC OVERALL FINDINGS ................................................. 205

1. What does indirect discrimination mean? ...................................... 206
   a. Recalling the indirect discrimination formulae ............................ 206
      i. Discrimination on grounds of nationality ............................ 206
      ii. Discrimination on grounds of sex .................................... 208
      iii. The formula’s elements according to case law .................... 210
   b. Are there links between the development in the areas of
      discrimination on grounds of nationality and sex discrimination? . 211
   c. The terminology used by the Court ....................................... 212

2. Why was the legal concept of indirect discrimination ‘invented’? ...... 213

IV. ISSUES FOR DEBATE ARISING FROM THE CASE LAW

DEFINITION .................................................................................. 214

1. Introductory remarks ................................................................. 214

2. Issues relating to the first part of the indirect discrimination formula . 215
   a. What does ‘indirect’ mean? ............................................... 215
b. Indirect discrimination and the Aristotelian equality formula ...... 217
   i. Indirect discrimination caused through different treatment ...... 218
   ii. Indirect discrimination caused through same treatment? ...... 219

   c. Indirect discrimination in the context of openly worded non-
      discrimination provisions ................................. 221
      i. In the case of general non-discrimination or equality
         provisions (comparability) ............................ 221
      ii. In the case of a non-exhaustive list of discriminatory grounds . 223

   d. The assessment of the discriminatory effect ...................... 225
      i. Indirect discrimination on grounds of nationality .......... 225
      ii. A different test for indirect sex discrimination .......... 228
      iii. Are there good reasons for the difference in approach? .... 233

   e. The relevance of intent for the recognition of the potentially
      indirect nature of discrimination ............................ 234

   f. The special case of ‘work of equal value’ ........................ 235
      i. Meaning and function of the concept of ‘work of equal value’ .. 236
      ii. Consequences in the context of indirect sex discrimination . 237

3. Issues relating to the second part of the indirect discrimination formula 239
   a. Objective justification: a vague test ........................ 239
      i. The test as formulated by the Court ........................ 239
      ii. Acceptable justification grounds .......................... 240
      iii. Over- and underinclusiveness ............................ 241
      iv. Proportionality ......................................... 241
      v. Can this vague test be improved on the conceptual level? .... 242

   b. Applying the objective justification test ........................ 243
      i. Who should determine the legitimacy of a claim of objective
         justification? ........................................... 243
      ii. The test: strict in principle, lenient in practice? .............. 245

   c. Specifically: justification based on economic considerations .... 247
      i. Economic justification in free movement law ................ 247
      ii. Specifically: economic justification in the context of
          indirect sex discrimination ............................... 248
      iii. Who should bear the costs of non-discrimination? .......... 250

   d. Procedural implications of the objective justification element .... 252

   e. The place of objective justification in the discrimination analysis 253
      i. Objective justification as an issue of justification (proper) . . . 254
      ii. Objective justification as an issue of causation .............. 254
      iii. The relevance of the distinction between the two approaches . . 258

4. Issues relating to the aim of the legal concept of indirect discrimination 260
   a. Effectiveness in a broader context ............................ 260
Table of Contents

b. Limits to effectiveness inherent in the indirect discrimination
   formula .......................................................... 262

c. Limits of a more general nature ............................... 264
   i. Comparability .......................................... 265
   ii. Different treatment .................................... 266

d. Awareness and avoidance .................................... 270

5. Findings and conclusion ........................................ 273
   a. Garrone’s definition revisited ............................ 273
   b. Consistency, precision and effectiveness ................ 276

B. THE DEVELOPMENT OF THE LEGAL DEFINITIONS ............ 279

I. INTRODUCTORY REMARKS ..................................... 279

II. CODIFICATION: THE BURDEN OF PROOF DIRECTIVE (SEX
    DISCRIMINATION) .............................................. 280
   1. The development of the definition ........................ 280
   2. The definition as adopted .................................. 283

III. A NEW GENERATION ........................................ 284
   1. The Race Directive ........................................ 285
      a. The development of the definition ...................... 285
      b. The definition as adopted ............................. 286
   2. The so-called General Framework Directive ............ 288
      a. The development of the definition ...................... 288
      b. The definition as adopted ............................. 291
   3. The revised Second Equal Treatment Directive (sex discrimination) .. 294
      a. The development of the definition ...................... 294
      b. The definition in comparison .......................... 295

IV. COMPARISON AND FINDINGS ................................ 296
   1. Recalling the legal definitions ............................ 296
   2. Different fields of application ........................... 297
   3. Precision, effectiveness and consistency of the new definitions ........ 301
      a. Precision ............................................. 301
      b. Effectiveness ......................................... 302
      c. Consistency .......................................... 302
**PART THREE:**  
DEMARCATIONS .................................................. 305

A. DIRECT AND INDIRECT DISCRIMINATION ................. 307

I. PRELIMINARY REMARKS ........................................ 307

II. DEMARCATION ON THE CONCEPTUAL LEVEL ............... 307

1. Introduction ................................................... 307

2. The effect of directly and indirectly discriminatory measures .......... 308
   a. The issue .................................................. 308
   b. Discrimination on grounds of nationality: *Ugliola, De Vos* and  
      *Mora Romero* .............................................. 308
   c. Discrimination on grounds of sex: *Schnorbus* .............. 310
      i. The case ............................................... 310
      ii. Comments ............................................ 312
   d. An interim conclusion (I) .................................. 315

3. Justification ................................................... 316
   a. Introductory remarks ....................................... 316
   b. Is there extra-textual justification for direct discrimination? ...... 317
      i. Absolutely worded provisions: Arts. 34(2), 90(1) and 12  
         EC as examples ............................................ 317
      ii. Relatively worded provisions: the example of direct taxation ... 320
      iii. Relatively worded provisions: the example of sex discrimi-
         nation in areas other than pay ................................ 322
      iv. A special case: equal pay for work of equal value ............. 324
   c. A new legislative approach .................................. 326
      i. The example of the Part-Time Work Directive ............... 326
      ii. The example of the Fixed-Term Work Directive ............. 328
      iii. The example of age discrimination ........................ 328
      iv. Not a universal approach .................................. 329
   d. An interim conclusion (II) .................................. 330

III. APPLYING THE CONCEPTS IN CONCRETE CASES .......... 333

1. Introductory remarks ........................................... 333

2. Analysing the case and the law ................................... 334
   a. Analysing the case .......................................... 334
      i. Which ground forms the basis for the distinction? .......... 334
      ii. Whose treatment is at issue? .............................. 336
   b. Analysing the law ........................................... 338
      i. The example of residence in the context of free movement ... 338
      ii. The example of marital and family status ................. 339
   c. An interim conclusion (III) .................................. 341
3. The reach of directly discriminatory grounds ........................................ 342
   a. The example of discrimination on grounds of pregnancy .......... 342
      i. Direct sex discrimination: Dekker .......................... 343
      ii. At the most indirect sex discrimination: Hertz ............. 347
      iii. Specific legislation: doing away with the need to distinguish
           between direct and indirect discrimination? ............... 349
   b. The example of discrimination against sexual minorities ......... 350
      i. Direct or indirect sex discrimination? ...................... 350
      ii. Indirect discrimination on grounds of nationality? .......... 353
      iii. Specific legislation: doing away with the need to distinguish
           between direct and indirect discrimination? ............... 354
   c. An interim conclusion (IV) ..................................... 355
4. Explicit provisions: no need for distinguishing between direct and
   indirect discrimination ............................................ 356
   a. Residence in Arts. 73, 77(2) and 78(2) of Regulation 1408/71 .... 357
   b. Language requirements under Art. 3(1) of Regulation 1612/68 ..... 359
   c. An interim conclusion (V) .................................... 361
5. Using EU citizenship as a shortcut? .................................. 364
   a. Pusa ............................................................ 364
   b. Gaumain-Cerri ................................................. 366
   c. An interim conclusion (VI) ................................... 368
IV. OVERALL CONCLUSION: A RATHER UNCLEAR DIVIDING LINE . . 368

B. INDIRECT DISCRIMINATION AND RESTRICTIONS IN A WIDER
SENSE ................................................................. 371

I. INTRODUCTORY REMARKS: APPROACHING A VAGUE DIVIDING
LINE ........................................................................ 371
II. WHY A NEW APPROACH? ........................................... 372
   1. Introductory remarks ............................................. 372
   2. Three early cases .................................................. 372
      a. The cases ....................................................... 372
         i. Prudential supervision: Van Binsbergen .................. 372
         ii. Recognition of foreign diplomas: Thieffry ............... 374
         iii. Recognition of foreign driving licences: Choquet .... 376
      b. Indirect discrimination or restriction? ....................... 377
   3. Confirmation in a changed legal context ........................... 381
      a. Kraus ........................................................... 381
      b. Gebhard ......................................................... 382
      c. Vlassopoulou .................................................. 384
4. No need for the demarcation under specific secondary law ............ 386
5. An interim conclusion (I) ........................................... 388

III. ON THE CONCEPTUAL LEVEL: IS THERE A DIFFERENCE IN EFFECT? .................................................. 389
1. Introductory remarks ........................................... 389
2. In search of truly indistinctly applicable measures: the example of cross-border television ........................................... 390
   a. Debauve ................................................. 391
      i. The case ........................................... 391
      ii. Comments ........................................ 392
   b. Collectieve Antennevoorziening .......................... 393
      i. The case ........................................... 393
      ii. Comments ........................................ 394
3. An interim conclusion (II) ...................................... 395

IV. ASSESSING CONCRETE CASES .................................... 397
1. Introductory remarks ........................................... 397
2. Different relevance of the concepts for different categories of cases? .... 397
   a. Taking double regulation cases out of indirect discrimination .... 397
      i. Contrasting Seco and Vander Elst: the cases ................. 398
      ii. Comments ........................................ 400
   b. Indirect discrimination: less relevant in core areas of Community law? ........................................... 402
3. Oscillating between indirect discrimination and restrictions ............. 403
   a. Konstantinidis ......................................... 403
      i. The case ........................................... 403
      ii. Comments ........................................ 405
   b. Dafeki ................................................... 406
      i. The case ........................................... 406
      ii. Comments ........................................ 407
4. The 'avoidance cases' ........................................... 408
   a. Taxation of life insurance: Safir ............................. 409
      i. The case ........................................... 409
      ii. Comments ........................................ 411
   b. Insurance for medical services: Kohll .......................... 413
      i. The case ........................................... 413
      ii. Comments ........................................ 414
5. An interim conclusion (iii) ....................................... 415

V. OVERALL CONCLUSION: A VERY VAGUE DIVIDING LINE ........ 417
C. DO WE STILL NEED THE CONCEPT OF INDIRECT DISCRIMINATION? ........................................... 419

I. RECALLING THE STARTING POINT AND THE MAIN FINDINGS . . 419
II. WHAT APPROACH FOR THE FUTURE? ......................... 421
  1. Introductory remarks ........................................... 421
  2. Keeping the status quo: the 'label of convenience' approach .......... 422
     a. A pragmatic approach ..................................... 422
     b. … and its meaning for the importance of the legal concept of indirect discrimination ...................................... 423
  3. Improving the status quo by sharpening definitions and distinctions . . 424
     a. Improving the definition of indirect discrimination .............. 424
     b. Demarcations: clarifying the dividing lines ..................... 427
        i. Direct and indirect discrimination .......................... 427
        ii. Indirect discrimination and restrictions in a wider sense ...... 428
  4. Abolishing (certain) distinctions .................................. 429
     a. In free movement law ....................................... 430
        i. Abolishing the concept of indirect discrimination .......... 430
        ii. Abolishing the concept of discrimination altogether .......... 430
     b. In areas where there is only a prohibition of discrimination ...... 432
        i. The status quo: indirect discrimination as an important concept ......................................................... 432
        ii. Changing the equality paradigm: the example of the Canadian approach .............................................. 432

TABLES ........................................................... 437

A. EC LEGISLATION ............................................. 437
  I. Regulations ................................................... 437
  II. Directives ..................................................... 438

B. CASE LAW ................................................... 441
  I. Court of Justice of the European Communities ..................... 441
     1. Court of Justice ............................................ 441
     2. Court of First Instance ...................................... 454
  II. EFTA Court ................................................... 455
  III. Permanent Court of International Justice .......................... 455
  IV. European Court of Human Rights ............................... 455
Table of Contents

V. Canadian Supreme Court .............................................. 455
VI. U.S. Supreme Court .................................................. 456
C. LITERATURE QUOTED ............................................... 456

INDEX ............................................................................. 509
## ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AG</td>
<td>Advocate General</td>
</tr>
<tr>
<td>AJP</td>
<td>Aktuelle Juristische Praxis</td>
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<tr>
<td>Art.</td>
<td>Article</td>
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<tr>
<td>BRK</td>
<td>Zeitschrift für Bank- und Kapitalmarktrecht</td>
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<tr>
<td>CDE</td>
<td>Cahiers de droit européen</td>
</tr>
<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination against Women</td>
</tr>
<tr>
<td>CML Rev</td>
<td>Common Market Law Review</td>
</tr>
<tr>
<td>DM</td>
<td>Deutsche Mark (German Mark; former German currency)</td>
</tr>
<tr>
<td>EC</td>
<td>European Community</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
</tr>
<tr>
<td>ECJ</td>
<td>European Court of Justice (Court of Justice of the European Communities)</td>
</tr>
<tr>
<td>ECSC</td>
<td>European Coal and Steel Community</td>
</tr>
<tr>
<td>EEC</td>
<td>European Economic Community</td>
</tr>
<tr>
<td>e.g.</td>
<td>exempli gratia (for example)</td>
</tr>
<tr>
<td>EL Rev</td>
<td>European Law Review</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>EuGH</td>
<td>Europäischer Gerichtshof (Court of Justice of the European Communities)</td>
</tr>
<tr>
<td>EuGRZ</td>
<td>Europäische Grundrechte-Zeitschrift</td>
</tr>
<tr>
<td>EWS</td>
<td>Zeitschrift für europäisches Wirtschafts- und Steuerrecht</td>
</tr>
<tr>
<td>GATT</td>
<td>General Agreement on Trade and Tariffs</td>
</tr>
<tr>
<td>I.C.R.</td>
<td>Industrial Court Reports (UK)</td>
</tr>
<tr>
<td>i.e.</td>
<td>id est (that is)</td>
</tr>
<tr>
<td>ISO</td>
<td>International Organization for Standardization</td>
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<tr>
<td>ILJ</td>
<td>Industrial Law Journal</td>
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<tr>
<td>LLM.</td>
<td>Master of Laws</td>
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<tr>
<td>MJ</td>
<td>Maastricht Journal of European and Comparative Law</td>
</tr>
<tr>
<td>NJB</td>
<td>Nederlands Juristenblad</td>
</tr>
<tr>
<td>NJW</td>
<td>Neue Juristische Wochenschrift</td>
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<tr>
<td>NTER</td>
<td>Nederlands tijdschrift voor Europees recht</td>
</tr>
<tr>
<td>n.y.r.</td>
<td>not yet reported</td>
</tr>
<tr>
<td>OJ</td>
<td>Official Journal of the European Union</td>
</tr>
<tr>
<td>PCIJ</td>
<td>Permanent Court of International Justice</td>
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<tr>
<td>RdA</td>
<td>Recht der Arbeit</td>
</tr>
<tr>
<td>R &amp; R</td>
<td>Tijdschrift voor Rechtstheorie en Rechtsphilosophie</td>
</tr>
<tr>
<td>RTDE</td>
<td>Revue trimestrielle de droit européén</td>
</tr>
<tr>
<td>Rt. Hon.</td>
<td>Right Honorable (Government Minister in the UK)</td>
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<tr>
<td>S.C.R.</td>
<td>Supreme Court Reports (Canada)</td>
</tr>
<tr>
<td>SDA</td>
<td>Sex Discrimination Act (UK)</td>
</tr>
<tr>
<td>SEW</td>
<td>Sociaal-economische wetgeving</td>
</tr>
<tr>
<td>SR</td>
<td>Systematische Sammlung (systematic collection of Swiss Federal law)</td>
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<tr>
<td>StR</td>
<td>Steuer Revue</td>
</tr>
<tr>
<td>TvC</td>
<td>Tijdschrift voor Consumentenrecht</td>
</tr>
<tr>
<td>UK</td>
<td>United Kingdom of Great Britain and Northern Ireland</td>
</tr>
<tr>
<td>USA</td>
<td>United States of America</td>
</tr>
<tr>
<td>WTO</td>
<td>World Trade Organisation</td>
</tr>
<tr>
<td>ZeuP</td>
<td>Zeitschrift für Europäisches Privatrecht</td>
</tr>
<tr>
<td>ZvglRwiss</td>
<td>Zeitschrift für vergleichende Rechtswissenschaft</td>
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