

# Application of the Concept of Indirect Discrimination by Latvian Courts

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The article provides the analysis of Latvian national court practice on application of the concept of non-discrimination. The concept was introduced into Latvian legal system by EU law. The definition and case law of the CJEU on indirect discrimination cases demonstrate numerous aspects to be taken into account for the correct application of respective concept. As the concept of indirect discrimination is new in Latvian legal system and, in addition, its complex national court practice reveals numerous aspects posing difficulties in its precise and correct application.

**Keywords:** indirect discrimination, EU law, substance, interpretation, Latvian court practice, application.

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## Introduction

The aim of the article is to provide analysis of Latvian court practice on application of the concept of indirect discrimination.

The concept of indirect discrimination is a relatively new concept. In EU law, it has been recognized for four decades, while in Latvian law it ‘appeared’ only 18 years ago. It took more than 10 years until Latvian court practice started applying the concept of indirect discrimination in practice.

Since the concept is relatively new and thus ‘unknown’ to those not directly involved with non-discrimination law issues, the article provides a short insight

into the origins of this concept. It also explains the substance of the concept, however, very briefly, by addressing the main constituents and emphasising the most relevant aspect to be taken into account in the context of this article. This approach was chosen due to the limited volume of the article, while there is extensive case law of the Court of Justice of the European Union (CJEU), as well as scholarly writings on numerous aspects and problems in application of the concept of indirect discrimination.

## 1. Roots of Concept of Indirect Discrimination

The concept of indirect discrimination has its origins in case law under Title VII of the US Civil Rights Act 1964 and was subsequently introduced into UK law and into European Union (EU) law through judicial interpretation of equal pay right as provided by Article 157(1) of the Treaty on the Functioning of the European Union (TFEU)<sup>1</sup>. This was the case of *Jenkins*<sup>2</sup>, referred by the British Employment Appeal Tribunal, in which the CJEU held that a difference in pay between full-time and part-time workers does amount to indirect discrimination, if it is a way to reduce the pay of part-time workers, which predominantly consist of women. Thereby, indirect discrimination was recognized by EU law.

However, application of the concept of indirect discrimination was problematic partially because the EU law itself did not provide a definition<sup>3</sup>. A definition of indirect discrimination first appeared in Directive 97/80/EEC<sup>4</sup> and later in subsequently adopted gender equality<sup>5</sup> and non-discrimination<sup>6</sup> directives.

Meanwhile, the European Court of Human Rights (ECtHR) expressly recognized protection against indirect discrimination under the European Convention for the Protection of Human Rights and Fundamental Freedoms

<sup>1</sup> Barnard, C., Hepple, B. Substantive equality. *Cambridge Law Journal*, 59(3), November 2000, pp. 562–585. That time it was Article 119 of EC Treaty.

<sup>2</sup> *J.P. Jenkins v. Kingsgate (Clothing Productions) Ltd.*, 96/80, 31 March 1981, European Court Reports 1981, p. 00911. Available: <http://curia.europa.eu/juris/showPdf.jsf;jsessionid=CBC022A9C08053A28B0DEB13A56275D7?text=&docid=90793&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=5186230> [last viewed 12.04.2020].

<sup>3</sup> Prechal, S. Combating Indirect Discrimination in Community Law context. *Legal Issues of European Integration*, Vol. 19, No. 1, 1993.

<sup>4</sup> Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, OJ L 14, 20.1.1998, pp. 6–8 (ES, DA, DE, EL, EN, FR, IT, NL, PT, FI, SV). Special edition in Latvian: Chapter 05, Vol. 003, pp. 264–266. No longer in force, date of the end of validity: 14/08/2009. Repealed by Directive 2006/54/EC.

<sup>5</sup> Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21.12.2004, p. 37–43 (ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, NL, PL, PT, SK, SL, FI, SV); Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, p. 23–36 (ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, MT, NL, PL, PT, SK, SL, FI, SV).

<sup>6</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, p. 22–26 (ES, DA, DE, EL, EN, FR, IT, NL, PT, FI, SV). Special edition in Latvian: Chapter 20, Vol. 001, pp. 23–27. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, pp. 16–22 (ES, DA, DE, EL, EN, FR, IT, NL, PT, FI, SV). Special edition in Latvian: Chapter 05, Vol. 004, pp. 79–85.

(ECHR) only on 2007 in case *D. H. and Others v. Czech Republic* on segregation of Roma children in education.<sup>7</sup>

Latvian legal system expressly introduced the concept of indirect discrimination by implementation of gender equality and non-discrimination directives in Latvian laws due to the accession to the EU in 1 May 2004 and the requirement to implement *acquis communautaire*. Consequently, the first normative acts providing definition of indirect discrimination were the Labour Law (Article 29) adopted on 2001,<sup>8</sup> and law “On Social Security” (Article 2<sup>1</sup>) amended on 2005.<sup>9</sup>

## 2. Scope of Application

The EU gender equality and non-discrimination law does not apply in all fields of life. So far, respective directives cover the following fields: employment, where discrimination is prohibited on six grounds – sex, race and ethnic origin, disability, age, religion or belief and sexual orientation (Directives 2000/43/EC, 2000/78/EC; 2006/54/EC); social security, where discrimination is prohibited on two grounds – race and ethnic origin, and sex (only with regard to some types of social benefits)(Directives 2000/43/EC; 79/7/EEC<sup>10</sup>); access to and supply of goods and services – on the grounds of race and ethnic origin and sex (Directives 2000/43/EC; 2004/113/EC).

Speaking about the scope of protection against discrimination under the EU law, it must be mentioned that Article 21 of the Charter of the Fundamental Rights of EU (CFREU) also prohibits discrimination on more extensive list of grounds than provided by the directives. However, CFREU is not universally applicable. According to Article 51(1) of the CFREU, it applies only with regard to the measures and actions taken by EU institutions and as far as the EU Member States implement EU law. Therefore, only in limited number of cases the prohibition of discrimination as provided by the CFREU may come into play. It is well demonstrated by one of Latvian court decisions discussed below, raising the issue of possible discriminatory application and thus contrary to the CFREU of the EU secondary legal act by the EU Member State.

Latvian law explicitly prohibits indirect discrimination within the scope required by the EU law and a little beyond it. It is due to the fact that EU gender equality and non-discrimination directives were implemented in the laws regulating particular fields of life. Since some of the laws transcend the scope covered by the EU law, the implemented non-discrimination provisions also apply in extended scope. For example, prohibition of discrimination is implemented

<sup>7</sup> Dijk van Pieter, Hoof van Fried, Rijn van Arjen, Zwaak Leo (eds.). *Theory and Practice of the European Convention on Human Rights*, Intersentia, 5<sup>th</sup> edition, 2018, p. 1006.

<sup>8</sup> Darba likums [Labour Law]. *Official Gazette* No. 105, 06.07.2001. Available: <https://likumi.lv/ta/id/26019-darba-likums> [last viewed 12.04.2020].

<sup>9</sup> Grozījumi likumā “Par sociālo drošību” [Amendments to the Law “On Social Security”], *Official Gazette*, No. 205, 22.12.2005. Available: <https://likumi.lv/ta/id/124266-grozijumi-likuma-par-socialo-drosibsu-> [last viewed 12.04.2020].

<sup>10</sup> Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ L 6, 10.1.1979, pp. 24–25 (DA, DE, EN, FR, IT, NL), special edition in Latvian: Chapter 05, Vol. 001, pp. 215–216.

in law “On Social Security”<sup>11</sup> which covers the entire Latvian social security system, thereby going far beyond the scope of Directive 79/7/EEC prohibiting sex discrimination with regard to specific types of social security benefits. As a result, prohibition of discrimination, including indirect discrimination, is applicable to all branches of social security system and all types of social security benefits.

There is also one specific case where protection against discrimination is provided beyond the scope of the EU directives. It regards non-discrimination in access to and supply of goods and services, where EU directives require protection on the grounds of sex and race and ethnic origin, while Latvian implementing law – the Law on the Protection of Consumer Rights<sup>12</sup> – which prohibits discrimination also on the ground of disability. It reflects the obligations deriving from UN Convention on the Rights of Persons with Disabilities.

### 3. Substance of Concept of Indirect Discrimination

As explained by one of the top European scholars having done extensive research on the concept of indirect discrimination – Christa Tobler, the concept means the following:

*Put simply, it relates to measures that appear to be unproblematic on their face but that, due to the circumstances in which they apply, nevertheless have discriminatory effect on a particular group of people. In other words, such measures appear acceptable on an abstract level but are problematic on a concrete level.<sup>13</sup>*

Different legal sources yield slightly different definitions.

The EU law stipulates explicit prohibition of indirect discrimination by providing a definition of indirect discrimination in several legal acts. In particular, gender equality<sup>14</sup> and non-discrimination directives present the following definition: indirect discrimination is

*where an apparently neutral provision, criterion or practice would put persons [because of their non-discrimination trait] at a particular disadvantage compared with other persons, unless that provision, criterion or practice is*

<sup>11</sup> Likums “Par sociālo drošību” [Law “On Social security”], *Official Gazette*, No. 144, 21.09.1995. Available: [https://likumi.lv/ta/id/124266-grozijumi-likuma-par-socialo-drosibу-\[last viewed 14.04.2020\].](https://likumi.lv/ta/id/124266-grozijumi-likuma-par-socialo-drosibу-[last viewed 14.04.2020].)

<sup>12</sup> Patērētāju tiesību aizsardzības likums [Consumer Rights Protection Law], *Official Gazette*, No. 104/105, 01.04.1999. Available: <https://likumi.lv/doc.php?id=23309> [last viewed 14.04.2020]

<sup>13</sup> Tobler, C. Limits and potential of the concept of indirect discrimination. European network of legal experts in the non-discrimination field, European Commission, 2008, p. 8. Available: <http://ec.europa.eu/social/BlobServlet?docId=1663&langId=en> [last viewed 12.04.2020].

<sup>14</sup> Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21.12.2004, pp. 37–43 (ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, NL, PL, PT, SK, SL, FI, SV); Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, pp. 23–36 (ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, MT, NL, PL, PT, SK, SL, FI, SV).

*objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.*<sup>15</sup>

The ECtHR itself provides neither explicit definition nor names prohibition of indirect discrimination as such, nevertheless, according to the interpretation given by the ECtHR, the ECHR prohibits indirect discrimination. The ECtHR has defined indirect discrimination in the following way:

*The Court has also accepted that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group [...], and that discrimination potentially contrary to the Convention may result from a de facto situation [...].*<sup>16</sup>

Although slightly different, both definitions in substance contain the same basic elements.

The discrimination must occur due to a ‘measure’ or ‘practice’, where measure might be a legal norm or a policy measure. Indirect discrimination can arise not only from a provision or criterion, which are usually fixed in written form. It can also arise from practice. Thus, the definition covers official written requirements, as well as practice, which is usually unwritten.

A provision, criterion, or practice is discriminatory if it has a discriminatory effect irrespective of the intent.<sup>17</sup>

Then such ‘measure’ or ‘practice’ must “put or might put persons at a particular disadvantage compared with other persons” or “has disproportionately prejudicial effects on a particular group”. It is understood as stipulating that the provision, criterion, or practice is indirectly discriminatory, if it might or has already affected negatively not only a group of the persons but also a single individual, as for the first time recognized by the CJEU in case *O'Flynn*<sup>18</sup> and reapproved, for example, in case *Leone*.<sup>19</sup> As regards requirement of putting “at a particular disadvantage”, the CJEU so far has explained it in greater detail only pertaining to race, ethnic origin and sex. With regard to race and ethnic origin ‘particular disadvantage’ means “that [...] particularly persons of a given

<sup>15</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, pp. 22–26 (ES, DA, DE, EL, EN, FR, IT, NL, PT, FI, SV). Special edition in Latvian: Chapter 20, Vol. 001, pp. 23–27.

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, pp. 16–22 (ES, DA, DE, EL, EN, FR, IT, NL, PT, FI, SV). Special edition in Latvian: Chapter 05, Vol. 004, pp. 79–85.

<sup>16</sup> Decision of the ECtHR in case *D.H. and Others v. Czech Republic*, 13 November 2007, application No. 57325/00, para. 175.

<sup>17</sup> See, for example, *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia*, CJEU 16 July 2015, C-83/14. Available: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=165912&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=5191114> [Last viewed 12.04.2020]; decision of the ECtHR in case *D.H. and Others v. Czech Republic*, 13 November 2007, application No. 57325/00, para. 179.

<sup>18</sup> *John O'Flynn v. Adjudication Officer*, the CJEU 23 May 1996, case C-237/94, European Court reports 1996, p. I-02617. Available: <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=99869&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=5198270> [last viewed 12.04.2020].

<sup>19</sup> *Maurice Leone, Blandine Leone v. Garde des Sceaux, ministre de la Justice, Caisse nationale de retraite des agents des collectivités locales*, the CJEU 17 July 2014, No. C-173/13. Available: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=155113&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=5197491> [last viewed 12.04.2020].

ethnic origin who are at a disadvantage because of the measure at issue".<sup>20</sup> With regard to the sex, such element is mostly judged by using statistical evidence, for example, where statistical evidence discloses that the measure negatively affects a much higher percent of females<sup>21</sup> or the group predominantly consisting of females.<sup>22</sup> Regarding the requirement "compared with other persons", it must be stressed that definition allows for hypothetical comparator. The matter of finding a relevant comparator has been a long-standing issue of debates, since it is very complex, thus, Christa Tobler stresses that "the comparison should always be between the groups of people relevant in the context of the type of discrimination at issue".<sup>23</sup> It also must be emphasised that indirect discrimination does not cover only the situations where persons who are in different situations are treated similarly, but also the situations where persons are in similar situations, but treated differently.<sup>24</sup>

Finally, indirect discrimination may be justified or, in other words

*provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.*

Under EU regulations, this is the main feature distinguishing direct and indirect discrimination, since direct discrimination cannot be justified. The EU law under this requirement implies a three-stage proportionality test: (1) there must be a legitimate aim; (2) the means must be appropriate to achieve the legitimate aim; (3) the means must be necessary to achieve the legitimate aim.<sup>25</sup> The same applies to justification of indirect discrimination under the ECHR – the state should prove that a 'measure' or a 'practice' was the result of objective factors not related to any grounds for discrimination.<sup>26</sup>

<sup>20</sup> See, for example, *Jyske Finans A/S v. Ligebehandlingsnævnet*, ECJRU 6 April 2017, C-668/15, para. 27. Available: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=189652&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7053049> [last viewed 12.04.2020].

<sup>21</sup> *Hoogendijk v. The Netherlands*, the ECtHR decision on admissibility, 6 January 2005, application No. 58641/00. Available: [https://hudoc.echr.coe.int/eng#{"appno":\["58641/00"\],"itemid":\["001-68064"\]}](https://hudoc.echr.coe.int/eng#{) [last viewed 12.04.2020].

<sup>22</sup> *Regina v. Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez*, the CJEU 9 February 1999, case C-167/97, ECR, 1998, p. I-05199, para. 62. Available: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=44408&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=5197989> [last viewed 12.04.2020].

<sup>23</sup> Tobler Christa, Limits and potential of the concept of indirect discrimination, European network of legal experts in the non-discrimination field, European Commission, 2008, p. 40. Available: <http://ec.europa.eu/social/BlobServlet?docId=1663&langId=en> [last viewed 12.04.2020].

<sup>24</sup> See, for example, Decision of the ECtHR in case *D.H. and Others v. Czech Republic*, 13 November 2007, application No. 57325/00, para. 180; *Bilka-Kaufhaus GmbH v. Karin Weber von Hartz*, the CJEU 13 May 1986, case 170/84, European Court reports, 1986, p. 01607. Available: <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=93347&pageIndex=0&doclang=EN&mode=lst&dir=&occ=firs t&part=1&cid=5201801> [last viewed 12.04.2020].

<sup>25</sup> *Bilka-Kaufhaus GmbH v. Karin Weber von Hartz*, the CJEU 13 May 1986, case 170/84, European Court reports, 1986, p. 01607. Available: <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=93347&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=5201801> [last viewed 12.04.2020].

<sup>26</sup> *Van Pieter, D., Van Fried, H., Van Arjen, R. Zwaak, L. (eds.)*. Theory and Practice of the European Convention on Human Rights. 5<sup>th</sup> edition. Intersentia, 2018, p. 1007.

#### 4. Latvian Court Practice

Altogether, seven decisions directly or indirectly addressing the right not to be indirectly discriminated against were detected. Not all of them are discussed in this article, as some of them do not deal with indirect discrimination stemming from legal regulation or practice, but rather from an incorrect application of the legal norms.<sup>27</sup> Two of the decisions are taken in the same case by a court of different level, thus only the decision of the Supreme Court is analysed.<sup>28</sup>

Four of the cases address indirect discrimination on the grounds of sex in the field of social security, in particular, the effect of the use of the right to parental leave on the entitlement and calculation method of social benefits. The disputed cases concerned the employment periods taken into account for the purposes and calculation of long-term service pension for an official of the state system of interior,<sup>29</sup> the periods taken into account for the purposes of the calculation of disability pension<sup>30</sup> and unemployment benefits.<sup>31</sup> In all the cases, national courts accepted the argument that the situation where person is treated less favourably with regard to the right to social security because a person has exercised such right is indirectly discriminatory against females, because they are still the group making use of the parental leave in absolute majority of the cases in comparison to males.

From the perspective of the concept of indirect discrimination, such conclusion is correct – indeed, the statistics demonstrate this fact, thus, any legal measures or practice disadvantaging persons who have exercised their right to parental leave has a disadvantageous effect on female persons. At the same time, in none of the decisions the second aspect of the concept of indirect discrimination was addressed, in particular, the words calling for examination whether

*provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.*

Additionally, in one the decisions under the discussion the court failed to identify direct discrimination instead of indirect discrimination. The dispute was whether the period from 1 January 1996 to 9 January 1997, when the applicant was on parental leave, had to be taken into account for the purpose of the calculation of long-service pension for the servant of the state system of

<sup>27</sup> Decision of 28 November 2017 of the Administrative District court in case No. A420187916, ECLI:LV:ADAT:2017:1128.A420187916.1.S. Available: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/336195.pdf> [last viewed 13.04.2020]; Decision of 11 February 2020 of Rēzekne Administrative Court in case No. A42-00830-20/43, ECLI:LV:ADRJRTN:2020:0211.A420261519.2.S. Available: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/404160.pdf> [last viewed 13.04.2020].

<sup>28</sup> Decision in case No. SKA-143/2019, ECLI:LV:AT:2019:0308.A420281216.3.L. Available: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/378215.pdf> [last viewed 13.04.2020]

<sup>29</sup> Decision of 11 February 2020 of Rēzekne Administrative Court in case No. A42-00830-20/43, ECLI:LV:ADRJRTN:2020:0211.A420261519.2.S. Available: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/404160.pdf> [last viewed 13.04.2020]; Decision of 9 February 2015 of the Senate of the Supreme Court in case No. SKA-286/2005. Available: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/235739.pdf> [last viewed 13.04.2020].

<sup>30</sup> Decision of 2 December 2014 of Administrative District Court in case No. A420303917. Available in Latvian: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/194331.pdf> [last viewed 13.04.2020]

<sup>31</sup> Decision of 28 November 2017 of the Administrative District Court in case No. A420187916, ECLI:LV:ADAT:2017:1128.A420187916.1.S. Available: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/336195.pdf> [last viewed 13.04.2020].

interior<sup>32</sup>. The Supreme Court supported the conclusion of the Court of Appeals (Regional Court), which ruled that parental leave period must be taken into account, otherwise it would lead to indirect discrimination against female servants, since they predominantly exercise the right to parental leave. Such finding is partially incorrect, because the right to parental leave until 1 June 2002 was granted to female employees (officials) only,<sup>33</sup> thus, this is the case of direct discrimination. Such erroneous decision, however, has no impact on the just outcome, namely, that such period must be taken into account as employment period. A correct identification of the type of discrimination – is it direct or indirect, might play a crucial role in case a dispute falls within the scope of the EU law, as in this case, because under the EU law direct discrimination cannot be justified,<sup>34</sup> while indirect discrimination could be justified.

Two cases decided by Latvian courts concern discrimination on other grounds than sex – one regards discrimination on the grounds of disability, and the other – on religious belief.

The judgement on discrimination on the grounds of disability concerns the notification of a debtor in writing on the existence of a debt.<sup>35</sup> In the respective case, the court of appeals found indirect discrimination based on disability, because the creditor failed to notify the debtor about the debt in an understandable manner. The debtor, due to disability, was unable to write and read. In this decision, the court also did not analyse whether the situation was directly or indirectly discriminatory. Instead, the court based its finding on the definition of indirect discrimination provided by Consumer Rights Protection Law,<sup>36</sup> copying the definition word for word from Directives 2004/113/EC and 2000/43/EC, namely, that indirect discrimination occurs where seemingly neutral criterion may cause negative consequences to a person on the grounds of sex, disability or ethnic origin. Firstly, the present case falls outside the scope of the EU law, since it prohibits discrimination in access to and supply of goods and services on two grounds only – sex and race and ethnic origin, as provided by the directives mentioned before, thus, national court was not formally obliged to follow any interpretation given by the CJEU on the matter. Secondly, if the matter were to fall within the scope of the EU law, it would be disputable whether the case concerned direct or indirect discrimination. According to the case law of the CJEU, if formally neutral measure or practice is applied intentionally to a person or group holding non-discrimination characteristic, knowing that such measure would put a person or a group in disadvantageous position, it has to be

<sup>32</sup> Decision of 9 February 2015 of the Senate of the Supreme Court in case No. SKA-286/2005. Available: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/235739.pdf> [last viewed 13.04.2020].

<sup>33</sup> Article 173 of the Labour Code, *Official Gazette*, No. 17, 27 April 1972, in force until 1 June 2002. Available in Latvian: <https://likumi.lv/ta/id/310175-latvijas-darba-likumu-kodekss> [last viewed 13.04.2020].

<sup>34</sup> See, for example, *Elisabeth Johanna Pacifica Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, the CJEU decision 8 November 1990 C-177/88. Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61988CJ0177> [last viewed 13.04.2020].

<sup>35</sup> Decision of 17 January 2019 of Zemgale Regional Court in case No. CA-0178-19/12, ECLI:LV:ZAT:2019:0117.C16079916.7.S. Available: <https://manas.tiesas.lv/eTiesasMvc/nolemumi/pdf/373266.pdf> [last viewed 13.04.2020].

<sup>36</sup> Pārētāju tiesību aizsardzības likums [Consumer Rights Protection Law], *Official Gazette*, No. 104/105, 1 April 1999. Available in Latvian: <https://likumi.lv/doc.php?id=23309> [last viewed 13.04.2020].

considered as direct discrimination.<sup>37</sup> Consequently, if the creditor was aware of the particular type of disability of a debtor and notified him/her in the manner not understandable due to that disability, then the creditor discriminated against a debtor in direct manner.

Finally, the last and most ‘visible’ decision dealing with indirect discrimination is the decision of the Senate of the Supreme Court that concerns the right of a person receiving state-paid (compensated) medical treatment in another EU Member State under Regulation 883/2004,<sup>38</sup> because Latvian health care service does not provide specific medical manipulation that corresponds to religious belief of the applicant. Latvian state refused to compensate medical treatment in another EU Member State and the question was raised whether such refusal by the state to compensate a specific medical treatment in another EU Member State, that would comply with the applicant’s religion might lead to the discrimination on the grounds of religious belief, as provided by Article 21(1) of the CFREU.<sup>39</sup> Respective questions were referred to the CJEU.<sup>40</sup> In the decision itself, the Senate started elaborating on the concept of indirect discrimination, however, in the view of the present author it was again done, erroneously. Instead of establishing whether the respective situation involved direct or indirect discrimination, the Senate started with the statement that this was the case of indirect discrimination, because indirect discrimination prohibited equal treatment in different situations. Such a statement is mistaken, knowing that both direct and indirect discrimination may occur in both situations – where equals are treated differently and where unequals are treated similarly.<sup>41</sup> At the same time, this decision was the first one, where the court addressed the issue of possible justification of discrimination.

As follows from the analysis above, there is still plenty of work for Latvian courts for improving knowledge on application of the concept of indirect discrimination. As identified, Latvian courts, first of all, in some cases fail to distinguish between direct and indirect discrimination, which might lead to erroneous outcome and, secondly, in establishing indirect discrimination, the national courts, except for one decision, fail to provide a further examination whether indirect discrimination in particular case is justified.

<sup>37</sup> CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia, the CJEU decision 16 July 2015, C-83/14, para. 95. Available: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=165912&pageIndex=0&doLang=EN&mode=lst&dir=&occ=first&part=1&cid=5191114> [last viewed 13.04.2020].

<sup>38</sup> Consolidated text: Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (Text with relevance for the EEA and for Switzerland). Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02004R0883-20140101> [last viewed 13.04.2020].

<sup>39</sup> Decision of 8 March 2019 of the Senate of the Supreme Court in case No. SKA-143/2019, ECLI:LV:AT:2019:0308.A420281216.3.L. Available: <https://manas.tiesas.lv/eTiesasMvc/nolemenumi/pdf/378215.pdf> [last viewed 13.04.2020].

<sup>40</sup> Request for a preliminary ruling from the Augstākā tiesa (Senāts) (Latvia) lodged on 20 March 2019 – A v. Veselības ministrija, case No. C-243/19. Available: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=214565&pageIndex=0&doLang=EN&mode=lst&dir=&occ=first&part=1&cid=2611276> [last viewed 13.04.2020].

<sup>41</sup> Tobler, C. Limits and potential of the concept of indirect discrimination. Available: file:///C:/Users/user/AppData/Local/Packages/Microsoft.MicrosoftEdge\_8wekyb3d8bbwe/TempState/Downloads/limpot08\_en%20(1).pdf [last viewed 13.04.2020].

## Summary

The concept of indirect discrimination in itself is comparatively new. In Latvian legal system it 'appeared' only 18 years ago. It explains the fact that national case law applying such concept is even more recent, and there are only seven detected decisions dealing with indirect discrimination.

The concept of indirect discrimination has been implemented into Latvian legal system by the EU law, although concept of indirect discrimination is also recognized in another important international agreement – the ECHR. The concept is defined explicitly by the EU legal acts and interpreted in numerous decisions of the CJEU. Due to extensive material on the concept of indirect discrimination, only substantial constituents and relevant aspects were addressed here.

Decisions of Latvian courts demonstrate the need for improving the knowledge not only on the concept of indirect discrimination, but also on EU non-discrimination law, since incorrect identification of the type of discrimination – direct or indirect – might lead to a mistaken outcome. At the same time, when the case indeed involves indirect discrimination, national courts must not only establish it, but also address the issue of whether indirect discrimination might be justified.

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