Justifications of discrimination

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The adoption of Article 13 of the Treaty of Amsterdam is undoubtedly an essential stage in the construction of the Community in providing for the incorporation into the Treaty of the impressive body of case law applied by the ECJ around the principle of equality of treatment[1] and demonstrates the will of the Community to broaden the causes of discrimination outlawed by Community law, namely race, ethnic origin, religion, beliefs, disability, age and sexual orientation. The Community has thus embarked upon implementing a general policy of fighting discrimination within the European Union in all areas of Community policy.

The right of any individual to equality before the law and protection against discrimination is a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the elimination of all forms of discrimination against women, the International Convention on the elimination of all forms of racial discrimination, the United Nations Covenant on civil and political rights and social and cultural rights and the European Convention on the Human Rights and fundamental freedoms, which have all been signed by every Member State. These principles are adopted and/or applied in all the constitutions of EU countries that have constitutions[2].

Labour relations do of course remain the main arena of the struggle against discrimination.

The development of Community law in the area of discrimination and equality of treatment may be said to be anchored in the construction applied by the Court of Justice of the European Communities (ECJ) in the field of equality of treatment between male and female workers, which has resulted in the emergence of general principles of Community law and the refinement of "pivotal concepts" for applying the principle of equality of treatment, e.g. the concept of indirect discrimination[3].

The adoption of the Directive of 29 June 2000 for the text on implementing the principle of equality of treatment without distinction of race or ethnic origin, and that of 27 November 2000 creating a general framework in favour of equality of treatment in employment and at work, continues the previous legal construction and marks important turning points in Community policy. Discrimination is viewed not in absolute terms, as has been the case since the Treaty of Rome for the barring of discrimination based on nationality, but in relative terms whereby differences in treatment are addressed legally in a manner constructed around a differentiated acceptance of such differences and of causes that justify such discrimination.

The approach adopted by Community law interacts with the domestic law of Member States[4] and the controversies created by the logic of equality, whether formal or concrete, and the "dilemma of difference"[5].

It is based on the need to address the causes of discrimination in terms of their specific features and to adopt a common procedure for combating discrimination.

It is organised on the basis of general recognition of direct and indirect discrimination, reversal of the burden of proof and acceptance of positive action.

It is clear that the evolution of Community law is marked by growing importance of the justifications the defendant must put forward to avoid being found guilty of discrimination. This growing importance of justifications is based primarily on the very notion of indirect discrimination, which the latest Directives define as a "provision, a criterion or an apparently neutral practice likely to lead to particular disadvantage for persons of a given race or ethnic origin, religion or faith, disability, age or sexual orientation, as compared with other persons, unless the provision, criterion or practice concerned is objectively justified by a legitimate objective, and the means of achieving that objective are appropriate and necessary"[6].

The role of the justifying factor is thus clearly at the centre of the evolution of Community law around the burden of proof. Member States must bring their systems of evidence into line with the principles laid down in the various Community law guidelines on discrimination[7]: "an individual who feels harmed by disregard of the principle of equality of treatment must establish within the national jurisdiction facts making it possible to presume direct or indirect discrimination and it is up to the defendant to prove that there has been no violation of the principle of equality of treatment".

Such proof therefore rests on the justifications that may be put forward by the employer.

Domestic law on discrimination has also been evolving steadily since Directive 97/80 on the burden of proof concerning inequality in the treatment of male and female workers came into force[8]. Both of the year 2000 Directives are currently being transposed in the various Member States. In France, this was done by the Law of 16 November 2001. Case law provides some examples of dealing with justifications, particularly in the trade union field [9].

The approach to discrimination from a perspective deliberately constructed around the relativity of differences is too recent to allow a systematic overview of the evolution of national law, even though some countries have already transposed the year 2000 Directives and have proceeded, as in the case of France, to apply the Community rules in advance. The most immediate question is rather whether a national judge retains complete freedom in the assessment of justifications.

This is clearly a crucial issue, for the judge, in accepting justification of an employer's behaviour or actions, must be able to arbitrate between the values that underlie the protection of the individual and the values applied by the market that are often central to the employer's justifications.

Acceptance of a justification does to a certain extent allow "redemption of discrimination"[10].

As Community law shapes national judicial practice, it is appropriate initially to consider the construction the Court of Justice has applied to the standards for examining such justifications, standards that are enshrined in the Directives and adapted or circumscribed for each cause of discrimination (I).

Having established the framework for qualification of judicial standards, it will be appropriate to see how these justifications operate in judicial practice around certain issues (II): can we at the present time construct a European judicial policy on fighting discrimination? Is there any consistency that could be constructed by judges from the economic and social objectives of the Treaty, within the frame-

work of the struggle against discrimination at Community level? Are current standards for scrutinising justifications sufficient to ensure that the objectives of Community law are complied with?

1. Legal framework of justifications

Insofar as Directives 2000/43 of 29 June 2000 and 2000/78 of 27 November 2000 form part of a continuum, the rules laid down by the Court of Justice within the scope of implementing equality of treatment between male and female workers are essential guides to interpretation: whether it be standards developed for qualifying indirect discrimination or the application of rules on the burden of proof, the Community approach is identical, as the new texts reflect, in the definition of indirect discrimination and the role of justification, just as in the case of the burden of proof they refer to the same proof of justification incumbent upon the employer.

Even if justification is not invoked within the same framework or at the same time it has an identical role in litigation about discrimination, which explains why its perception by judges is based on the same reference criteria [11].

We note that the Court of Justice has laid down certain general features that justifications put forward by the employer (1–1) must have regardless of their economic nature or source. The texts also provide for general justifications that are established as real exceptions (1–2).

1.1 Features of justifications

In the Bilka[12] ruling, the ECJ indicated that where it was proved that a statistically identifiable group was affected by an unfavourable provision, the employer could demonstrate that a measure likely to mask discrimination was justified on condition that it sought to achieve a legitimate objective, unconnected with discrimination, based on meeting a real, necessary and proportionate corporate need. The same criteria are enshrined in the Directives: justifications must be objective, be justified by a legitimate objective and be implemented by appropriate and necessary means.

1.1.1 Objectivity of justifications

This clearly implies that justifications are not subjective and are therefore not linked to an individual. In other words, any justification invoked by the employer that is likely to relate to a characteristic of an individual risks becoming discriminatory, particularly in the area of indirect discrimination, where the group identified is always a qualified group, most often statistically qualified[13], even though in the new Directives it need only be identifiable.

Thus the Court has not accepted an employer invoking poor quality of work done by women (because of being women)[14].

The requirement that there be an objective criterion has the advantage of preventing different judicial assessments. Clearly this requirement pertains to “objectively justified economic reasons” based on the state of the labour market or an economic crisis situation on a market. Such reasons may pertain to company management [15] or to guidelines provided by national legislation: a provision is objective “if it forms part of a set of measures seeking to loosen constraints on the small businesses that play an essential role in job creation” [16].

The objective criterion must by definition be unconnected with any discrimination. This may seem obvious but it is repeated by the Court because in cases of indirect discrimination the dividing point between the stage of identifying the presumption of discrimination that affects a group (e.g. part-time workers who are women) and the justification invoked by the employer (need for part-time work to meet flexibility requirements) is very often poorly identified[17]. Thus, slippage between the two may easily arise when it comes to ruling on the right to continuing to be paid during sickness, granted only to workers putting in a minimum number of hours per week or per month[18], or on a difference in remuneration calculated on seniority of workers doing a sufficient number of hours[19]. The employer knows that the group of workers deprived of the benefit are mainly women, but justifications will in all cases relate to the need to favour personnel who have committed themselves substantially to the company.

This standard of objective criterion thus makes it possible to accept all kinds of reasons, e.g. the Enderby ruling[20] accepted the labour market situation as justification for a difference in remuneration between male and female workers. Other rulings have also invoked elements concerning the work force, requirements of dexterity or flexibility in working hours[21], employment promotion or training[22].

Arguments pertaining to company management and labour market requirements may therefore be invoked *ad infinitum*. The Court attaches no importance to the source of justifications: whether it is employer choice specific to the company or an argument based on national legislation[23], such as compliance with social policy[24] or the clause on corporate choice in redundancy procedures[25], the justification will always be objective

By insisting on referral to the national judge for assessment, particularly in recent times[26], the Court seems to take the view that this feature is not sufficient for examining the pertinence of the situation to effective combating of discrimination.

1.1.2 The end pursued by the employer

The Court examines the legitimacy of the end pursued by the employer and therefore reserves the right to assess its reality and appropriateness as a function of the size of the company, the business sector, the reference period, etc.

The purpose of this criterion, which is extremely close to the one described above is to make the national judge look for the employer's real motives: in most cases they will be hidden, especially if they relates to employees' sex, religion, age or sexual orientation.

Economic justification is systematically accepted since economic development as part of economic competitiveness within the European Union is supposed to be a prime objective and therefore legitimate.

Examining the legitimacy of justification does not prevent some slippage, e.g. in the Lewen case[27] the Court accepted an employer withholding a bonus from an employee on study leave because it was only payable in consideration of the employee's attendance at work. It is clear that leave after maternity leave is mainly taken by women: was the objective of the company's anti-absenteeism bonus, whether legitimate or not, unrelated to gender? This slippage, which pertains to some "pussyfooting" in domestic French law[28], is due to two approaches to equality: abstract equality and concrete equality.

Community law as a whole seeks to achieve concrete equality, and this objective, which is particularly clear in the new Directives, should be promoted by the Court.

Here again we note that such scrutiny of their purpose might enable any justifications to be accepted. In Britain, where legal scrutiny of justifications is long established, not only an over-readiness to accept economic arguments, an acceptance very often related to the liberal or even ultra-liberal economic environment, but also the confidence placed in judges in the commercial regulation of workplace relationships[29], are often criticised.

Yet examination of the end pursued has a negative function: if the employer fails to convince the judge of the pertinence of his objective, the judge may then easily infer that the end pursued is not unconnected with discrimination[30]. Thus, in the Danfoss ruling, the Court took view that justification based on the interests of the company's remuneration system could not be accepted because of its opaqueness. In a system of individual pay increases characterised by a total lack of transparency, differences in treatment between men and women will be regarded as discriminatory.

The Court requires the employer to have made a deliberate policy choice in decisions that entail a difference in treatment, and to be able to explain it: where the policy pursued is opaque or non-transparent, the end may be regarded as discriminatory [31]. Within the framework of the changes to the proof regime, all policies that are not affirmed by employers or are based on opaque decision-making criteria are discriminatory.

The Directive of 29 June 2000 requires the objective to be both legitimate and unconnected with any form of racial or ethnic discrimination. The view may be taken that the employer must prove that he has taken account of the effects of his measures on the group or the employees concerned [32].

Proof of the deliberate and transparent nature of a measure adopted by the employer is also likely to assist scrutiny of its necessity and proportionateness.

1.1.3 Necessity and proportionateness of means

Examination of the necessary and proportionate nature of means used by the employer enables the judge to assess their appropriateness to the objective pursued. Thus judges must ascertain that the remuneration system does indeed enable candidates to be attracted [33] or loyalty to be created by arrangements based on seniority of employees working full time, that flexibility in remuneration systems makes it possible to compensate for the adaptability expected of employees in the organisation of work[34] and that the bonus system deters absenteeism [35].

Examining the necessity of a measure makes it possible to verify its reality and prevents justifications that rest on stereotyped models of behaviour[36]. This will prevent the employer from improperly invoking commercial considerations against employees who feel affected by an exclusion measure based on age, sexual orientation or disability.

Examination of the requirement of a direct causal link between a justification and a legitimate objective invoked by the employer turns out to be very important, particularly in situations in which a presumption of discrimination based on race or ethnic origin is established. Do occupational qualification requirements lead to excluding employees of Maghrebi origin from temporary work? Are the medical fitness conditions checked by an industrial doctor sufficiently real and indispensable to deny fitness of a black-skinned employee? Do the company safety requirements mean that a disabled employee cannot be promoted? And so on.

Proportionateness of means is also likely to diminish any breach, otherwise deemed legitimate, of individual rights.

This requirement of proportionateness allows examination of employer choices in the area of results achieved. Balancing the interests at stake is a general technique of Community law[37] that obliges the judge find out whether the end cannot be achieved by other means which do not breach individual rights[38]. Thus, preferential acceptance for legal training of male candidates who have done their military service is not disproportionate, as it only applies for a short period commensurate with the delay incurred[39].

Judges have hitherto analysed proportionateness on the basis of the objective situation of the company, without reference to an obligation of positive intervention to regulate a situation in which individual rights are being infringed [40].

The features required of justifications are therefore reference standards binding upon the national judge in his assessment of justifications.

Analysis of these features shows that the frame of reference is set by Community law but is left to the discretion of the national judge. French law on the analysis of justifications is poor because the notion of indirect discrimination was only introduced by the Law of 16 November 2001 and had not previously figured in French case law. However, since 1995[41], French judges have used an approach to evidence of discrimination which allows the very new practice of conducting litigation that was hitherto “weak”, particularly in the field of trade union discrimination[42], by virtue of the interaction between the regime of proof and the acceptance, on the merits, of discrimination[43].

Hitherto, French judges have not systematically used the analysis of the features of justifications put forward by employers to focus on proof that the arguments invoked by the employer are unconnected with any discrimination[44]. This right of discrimination is very recent in France, because of very great difficulty of integrating Community reasoning in France[45].

Referral to the national judge to assess justifications of discrimination also applies to the specific forms of justification referred to in the Directives of 29 June 2000 and 27 November 2000.

1.2 Pre-established justifications

It is important to stress that both Directives have sought to specify the general exceptions. We note that the Community draftsman does not deal in a similar way with the causes of discrimination: he has taken account of economic requirements or different sociological conditions in Member States in order to cater for very broad exceptions. Member States may exclude armed forces from the scope of their legislation[46]. Exceptions based on occupational requirements[47] are a general exception for all causes of discrimination.

Specific justifications are also provided for by virtue of age or disability of workers.

1.2.1. The essential and determinant occupational requirement

Article 4 of the Directive of 29 June 2000 allows Member States to authorise a difference in treatment for a discriminatory reason where “by virtue of the nature of occupational activity or the conditions in which it is carried on, the characteristic in question is an essential and determinant characteristic”.

Article 4 of the Directive of 27 November 2000 is drafted in the same terms. In

addition, the objective must also be legitimate and proportionate.

The texts enshrine the general exception introduced into Directive 76/207 relating to equality of treatment in working conditions as between male and female workers.

The ECJ has certainly applied a very restrictive interpretation to the text in order to further the objective of equality. The original text only refers to the "determinant condition", but the Court's successive rulings have sought to identify jobs for which gender is really a determinant condition. The Court has made a substantial number of rulings concerning jobs within the scope of policy on armed forces and emergency services. It certainly restricts jobs in which gender is a determinant and essential condition to those involving contact with situations[48] of great violence.

This view, which is still amongst the rulings susceptible to a more or less strict interpretation, has always been guided by respect for the essential objective of Community policy.

It is clear that the Court of Justice is going to have to define the jobs for which race or ethnic origin, religion, age or disability are essential and determinant conditions. It is also certain that it will apply a restrictive interpretation to this exception.

It remains true that the very concept of what may be determinant and essential is left to the judge and is therefore subject to changes in ideas and in society. This relates to the evolving nature of Community law, which is particularly necessary in the assessment of discrimination.

The Directive of 27 November 2000 also has specific provisions on jobs in "trendy" companies. It enables Member States to uphold its provisions, but not to adopt new ones.

Different treatment based on an individual's religion or faith does not constitute discrimination if religion or faith is a requirement that is essential, legitimate and justified in relation to the ethics of the organisation.

Here again, only the features of the requirement are specified and their assessment is left to the national judge. The limits put in place by Community law consist in referral to domestic constitutional rights within Member States.

In France, no provisions on this point were incorporated in the Law of 16 November 2001. Earlier case law examining the specific requirements of "trendy" businesses whilst accepting them should not be called into question by Community law [49].

The judge may examine the match between the employer's requirements and the employee's religious and ethical commitment. Scrutinising the legitimacy of employer requirements is likely to be very tricky in this respect: should legitimacy be assessed in relation to the importance of the requirement or its nature? In other words, would the judge be entitled to check, via the mechanism of scrutiny, the legitimacy of a faith or belief?

The relativity of the notion of discrimination is even more striking when we consider specific justifications.

1.2.2 Specific justifications

These are the result of compromises that have had to be made not only at the traditional level of the Member States of the Union, when drafting Directives, but also at Community level between the economic objectives that predominate within

the scope of employment policy along the lines of the "Lisbon process" and the fundamental objectives stated within the scope of Article 13.

Where disabled persons are concerned, the employer is obliged to make reasonable arrangements, unless these impose a disproportionate burden on him. The criteria for assessing what is reasonable will be left to the judge; the disproportionateness of burdens will depend on the size and resources of the company.

The Directive has the merit of forcing States that have not implemented any policy in favour of disabled persons to embark upon one to the effect that an employer's refusal, for workplace layout reasons, to keep a disabled employee will in itself be discriminatory in the future. Furthermore, training obligations to enable workplace access must be instituted in Member States.

Obstacles of a financial nature, however, are always justified. They will be scrutinised by the judge. Here, specific justifications enable the employer to avoid discrimination, subject to providing proof of the heavy financial burden of integrating a disabled person.

The French legislature has not considered it necessary to introduce a specific provision, owing to the abundance of enactments about disabled people that cover priority of access to employment[50], workplace[51] layout, the organisation of funding within the framework of Agefip[52] and, above all, the workplace adaptation and rehabilitation obligations incumbent upon the employer when an employee becomes unfit and disabled [53].

We may nevertheless regret that the French legislature has not taken the opportunity to proclaim e a general obligation to ensure reasonable workplace layout for the disabled, which would perhaps have induced the social partners (management and employees) to reach more quickly collective agreements promoting the integration of disabled people [54]. The national judge may always, if the opportunity arises, take the view, within the framework of the obligation to interpret French law in accordance with Community law, that he can impose this obligation.

Justifications based on age are deemed legitimate when based on policies in relating to employment, the labour market and occupational training. Article 6 contains a non-limitative list of justifications that are accepted without judicial scrutiny. We may wonder in what cases discrimination based on age could still arise, since the list, despite being supposedly indicative, justifies all situations of exclusion based on age within the scope both of employment and of occupational social protection regimes.

The French Law includes in Article L 122-45-3 a list of legitimate differences such as barring access to employment or putting in place special working conditions to ensure the protection of young and older workers, setting a minimum age for recruitment based on the training required for the job concerned, or the need for a reasonable period of employment before retirement.

The judge nevertheless has the obligation of checking that differences in treatment based on age are objectively and reasonably justified by a legitimate objective and that the means of achieving the latter are appropriate and necessary [55].

This analysis of the justifications framed by Community law shows that the objective of fighting against discrimination has been put in place by broadening Community policy to new causes of discrimination, whilst opening up the possibilities of justifying and hence legitimising discriminatory acts in the broadest

sense. We may view them as counterbalances to changes in the recognition of discrimination that are favourable to injured parties, particularly in the area of indirect discrimination, and which are also unfavourable to employers by virtue of where the burden of proof is placed.

This very broad acceptance of justifications makes pursuing the objective of fighting all forms of discrimination more difficult to address, although some people will surely find it more consistent with the economic construction of the European market.

The recognition of discrimination is therefore highly relative. Its effectiveness depends on the tenacity of the judge, since these standards of examination are all based on the pertinence of his assessment of what is "objective", "legitimate", "proportionate", "necessary", "reasonable", "determinant" and "essential".

The law of discrimination is a law of eminently relative adjectives.

2 Judicial scrutiny of justifications

The Court of Justice and Community legislation delegate the acceptance of justifications to the national judge. Here there is clear influence of Anglo Saxon law: the amount of confidence placed in the judge, in the application of qualification standards, has always been far greater in Common Law countries.

Experience also shows that the diversity and complexity of situations in the area of discrimination call for a great deal of assessment leeway to be left to the judge.

This reliance on the national judge also allows the assessment of justifications to evolve in line with changes within society.

Furthermore, this reliance on judicial assessment is the cornerstone of the system of proof framed by the three Directives of 1997 and 2000.

It may therefore be helpful to consider the mode of operation of the national judge in dealing with justifications before looking at the limits.

2.1 Mode of operation of the national judge

The trends do not seem to be uniform. While the very broad relativity introduced by Community law in the construction of the law of discrimination as regards the acceptance of justifications appears to lead to the possibility of accepting general and abstract justifications that open the way to accepting discriminatory differences in treatment, yet judges seem to be seeking at concrete level to accept only justifications that convince them.

2.1.1 Acceptance of general justifications

This trend here arises primarily from ECJ guidance tending systematically to accept financial justifications. Even though the texts refer the assessment of the characteristics of justifications to the national judge, the Court reserves the right to examine the legitimacy of objectives "when the question is whether national legislation or a provision of a convention conforms to Community law"[56]. In the majority of cases, however, it is a question of company management or State social policy. In the Kachelmann ruling, the Court very clearly stated "that in the current state of Community social law, social policy is the province of the Member States, which have a broad margin of reasonable assessment with regard to nature of social protection measures and the concrete modalities for bringing them about. Measures of this kind that are suitable for achieving this objective and necessary

for the purpose and are justified by reasons unconnected with discrimination based on gender may not be regarded as violating the principle of equality of treatment".

This recent guidance from the ECJ shows that although it leaves the national judge to apply its criteria, criteria that leave market forces, as we have seen, a very large role, it still seeks to retain control over the assessment of justifications relating to social policy. This leaves plenty of scope for States wishing to introduce differences of treatment into the framework of their social policy [57].

The Court very widely accepts justifications derived from the social policy of States, whilst checking at the same time that they are unconnected with any discrimination [58].

It is particularly relevant that in this respect Mr Saggio as Advocate General, insisted on not applying any *a priori* generalisation of justifications. He obliged national judges to examine workers' situations on a case by case basis so as to see whether, in the particular case, the criterion of social choice distinguishing between full-time and part-time workers within the framework of German legislation[59] was applied contract by contract. The Court has not followed his position, which nonetheless rested on precedents in which the Court was able to accept "that a simple generalisation involving certain categories of workers does not make it possible to derive objective criteria unconnected with any discrimination" [60].

The concrete case by case approach avoiding the generalisation of justifications is not therefore adopted by the Court despite seeming to be a guarantee at individual level. However, it leaves the national judge complete freedom in his assessment of the evidence put before him.

2.1.2 The requirement for convincing proof of justification

Within the framework of the assessment of evidence of justification, a trend towards greater protection of employees may be discerned.

The system of shifting the burden of proof rests on the development of ECJ case law since 1993, which has sought to facilitate the recognition of discrimination by limiting the evidence for the plaintiff to facts that suggest a difference in treatment. The burden of proof of justification rests with the defendant. In France, this modification to the burden of proof has led to weighty exchanges of views both ideologically and technically. The law of 16 November 2001 transposed the Directives of 29 June 2000 and 27 November 2000 to the effect that the plaintiff must "submit to the judge factual elements making it possible to presume direct or indirect discrimination". The same formula was adopted in the French Law of 17 January 2002 in its provisions relating to proof of moral harassment. An individual who feels harmed as the result of repeated acts of moral harassment thus has "to submit factual elements that suggest harassment".

In the light of such elements, it is up to the defendant to prove that the acts concerned do not constitute harassment.

On this provision, the Constitutional Council has issued a reservation of interpretation to the effect that the favour shown to plaintiffs cannot relieve them of having to establish the relevance of precise and concordant facts.

This reminder of the requirement for precise and concordant facts does not seem to conflict with the logic of Community law, which requires proof of facts constituting harassment or differences in treatment.

It seems important that there should be no confusion between instituting a presumption of discrimination and the actual occurrence of discrimination.

The formulation of the Law of 16 November 2002, like previous ECJ case law, seems reconcilable with the requirement imposed by the Constitutional Council concerning moral harassment. It would in fact be extremely unfortunate if the two texts, drafted in a similar way and contributing to the creation of uniform law protecting the fundamental rights of individuals, were to be subject to two different modes of application.

It seems clear here that proof of allegations, understood in accordance with the Motulsky formula as "all factual circumstances pertaining to elements generating a right" [61], lies at the heart of the new regime of proof. It must be presented to the judge with care and precision[62].

It is clear in Community law, as in French domestic law, that judges have required not only proof of precise and concordant facts making it possible to consider that there is a difference in treatment which may be discriminatory, but also that it be incumbent upon the employer to contest the discriminatory nature of a justification on the basis of objective elements unconnected with any discrimination.

It seems, however, that the judges are seeking, perhaps in line with the proof required in the United States and Canada [63], to be convinced by the justification invoked by the employer. Of course such conviction works by ascertainment of the legitimacy and necessity of the justification concerned, but it seems essential that the judge find the justification convincing.

The force of this requirement for conviction is confirmed in the Law of 16 November 2001 on discrimination[64] and the Law of 17 January 2002 on moral harassment: "the judge forms his conviction after ordering, in cases of need, the necessary investigatory measures".

A few examples will make clear the part played by the need to convince the judge. In the Enderby case, the judge accepted that shortage of candidates could justify an employer attracting employees by offering higher salaries. But what is needed is to go further and verify "the extent to which these objectives justify a difference in remuneration".

The Community judge does in fact impose on the national judge the need to be convinced of the necessity of differences in treatment.

Similarly, in certain cases the Court has ultimately not accepted financial justification: thus, in the Rinner-Kühne case, the Community judge did not accept an argument based on part-time workers being less committed to the company or on the relationship of economic interdependence with such employees being looser.

This requirement to be convinced by justifications put forward by the employer thus extends to examining the features that a justification must have.

This same trend occurs in French case law.

In the area of unequal pay, the Court of Cassation, which has implemented the new regime of proof, stated very clearly in a ruling of 19 December 2000[65] that the employer had not produced convincing objective reasons for different remuneration between men and women, "since the women were working nights just like the men, had seniority at least equal to the men, their real functions were equal in value to those of the men, and the introduction of new technologies had the effect of making the different machine work stations technically equivalent".

On the subject of trade union discrimination, the rulings also show that justifications must be convincing in order to preclude any possibility of discrimination. Acting in anticipation, the Court of Cassation has applied the new rules of evidence to discrimination affecting the career development of trade union representatives. After proving that the careers of trade union representatives had been subject to significant differences in treatment over long periods, the judges had to try to establish whether the employer was putting forward legitimate justifications unconnected with any discrimination. Neither the complaints made against the employees[66] nor their professional shortcomings nor the training requirements nor reluctance of employees to adapt or to improve their occupational skills were accepted[67]. In a ruling of 4 July 2000[68] the Court takes the view that, in order to justify the delay in promoting the protected employee, the employer invoked objective criteria of occupational competence. However, "he did not adduce any element such as to establish that the occupational situation of the employee was the sole cause of the disparities observed".

It was not only the nature of the justification invoked, pertaining to needs and interests of the company or their legitimacy and objectivity, that lay at the root of their rejection, but also their lack of pertinence to the requirement that the judge be convinced that there was no discrimination.

We might however be struck by the justifications invoked by the employers concerning career development: they simply maintained that advancement were a matter of company choice and that it had not been proved that the promotion concerned was not in line with the occupational qualifications of the employees who claimed to be disadvantaged[69].

These arguments raise very directly the question of the judge's mode of examining the way in which the employer handles advancement [70]: "although the judge does not have to put himself in the employer's shoes, it is up to him to ascertain, in cases of trade union discrimination, the conditions within which the career of the person concerned proceeded". Judges cannot be convinced in a case of trade union discrimination, such as that judged by the Court of Cassation on 13 February 2001, by a justification based on the employer's assessment "of the merits of employees, which may lead to a negative overall assessment" [71]. In other words, the employer cannot base justifications solely on the modalities of exercising the powers of management, because of the lack of objectivity of the line of argument.

Such conviction based on the concrete facts of each case is in fact the mode of scrutiny sought by Advocate General Saggio in his submissions in the Kachelmann case.

It is also possible to regard this requirement for the judge to be convinced as a result of the apportionment by the new Directives of the burden of proof, since the risk of proof rests on the employer.

This conviction requirement is also permitted by the mode of examining the features that justifications must have, since it is possible for the national judge to assess in the light of his own values the pertinence of economic arguments put forward by the employer and their causal link with facts representing a difference in treatment.

It therefore seems that approaches to justifications do not always follow a fully consistent line.

The general construction rests, however, starting from the mode of scrutiny laid down by the Court of Justice, on leaving it to the national judge to assess, by his own system of evidence and his own system of values, whether a justification is convincing or not.

The result, which would be worth verifying by a very broad study in the various EU countries, is that the acceptance of justifications will necessarily be conditioned by the judge's political, economic and philosophical context.

We may also wonder whether it is indeed at the level of the national judge that decisions about such justifications should take place or whether this function should not belong to other spheres[72].

This construction, resting on a relativity of the approach to discrimination and depending on a conviction in the judge's mind which, although circumscribed, is determinant, leads to a number of questions.

2.2 Questioning the role of the national judge

Referring the assessment of the necessity and legitimacy of justifications to the national judge has the clear drawback of leaving him an extreme freedom of assessment, since the Court of Justice does not rule on the values that might lead national judges to find a common line.

It does in fact seem that in spite of a mode of proof that undoubtedly favours victims of discrimination, the national judge has to arbitrate and establish a balance between the economic imperatives arising from the need for competitiveness, and more generally between commercial values and the protection of individual rights. Where for example an employer invokes the costs involved in employing a disabled person, the judge must assess on the basis of reasonableness and proportionateness the dividing line between company interests and the protection of disabled persons. He also has to arbitrate between company organization and the protection of prayer arrangements for Muslim employees or the refusal of a job in a butcher's shop because of religious convictions.

This balance between opposing values is even more difficult to strike with regard to indirect discrimination.

It is felt that the absence of guidelines as to the values the judge must apply could result in increasing unpredictability in the assessment of justificatory causes and in widening gaps between the national approaches of the various EU Member States.

The biggest risk is that invoking justifications based on company interests and competitiveness may allow systematic justifications of discrimination throughout the European Union, a tendency already observed in Britain.

It is also important for national judges to be able to clarify their assessments by reference to strongly held values that provide guidance for assessing the legitimacy, necessity and proportionateness of justifications.

Can the view be taken that there is consistency between the objectives represented by Community law?

Could the objectives contained in the Directives, in the preambles to the texts, be a reference of source in this respect?

They contain a major ambiguity revealed by the texts, which consistently proclaim that economic objectives are the corporate objectives of social progress and of combating discrimination.

While the main objective remains the fight against discrimination, the objectives pertaining to employment policy and the social inclusion of disadvantaged groups are also referred to in the preambles to the Directives, as too is the promotion of a qualified, trained and adaptable workforce.

The Directive of 27 November 2000 also sets out objectives that are not really reflected in the texts. Thus it states that "the guidelines for employment in 2000 approved by the European Council in Helsinki on 10 and 11 December 1999 stress the need to promote a labour market favourable to social inclusion by formulating a coherent set of policies intended to fight discrimination against groups such as disabled persons. They also stress the need to pay particular attention to helping older workers to play a larger part in working life"

While the objective of social inclusion of disadvantaged groups may be stated, it is not reflected directly in strong rules barring discrimination[73].

It justifies positive action programmes[74]. It seems moreover that the very wide acceptance of justifications for disabled or older workers is counterbalanced by the possibilities open to Member States for putting positive actions in place [75].

However, comparing the framework of assessment of justifications as outlined by the ECJ with these objectives of social inclusion and employment of individuals or groups likely to be discriminated against, and the recent clear trends of Community law on positive action, might suggest that the national judge should always give priority to the requirements of social inclusion and employment when assessing the proportionateness of an employer's requirements.

In the area of indirect discrimination, assessment of the proportionateness of infringement of the rights of individuals concerned may also lead the judge to see whether other measures may lead to the employer achieving the same objective. These objectives of social inclusion and employment of disadvantaged groups could be incorporated in the judge's assessment of the alternatives open to the employer.

This would suppose the judge moving on from simply ascertaining the existence of other possibilities[76] to obliging the employer to seek alternative solutions. Scrutiny of the proportionateness of the infringement of individual rights giving rise to a difference in treatment could only be achieved if the employer has taken all the steps necessary to prevent or limit any disadvantage. This logic has been incorporated for disabled persons. It could become generalised.

This search for a balance between conflicting values in discrimination litigation within the framework of a rule binding the judge applies in American and Canadian law[77]. In Canada, the promulgation of the Charter of individual rights has allowed the development of a great body of case law of the Supreme Court of Canada seeking to put in place a real policy on fighting discrimination while favouring the integration of minority groups. The attempt at integration and social inclusion has led to the development, with regard to indirect discrimination, of an obligation of "reasonable accommodation"[78]. The employer must prove that he has striven to reach agreement with employees penalised indirectly by his occupational requirements, with a view to an arrangement enabling account to be taken of the occupational needs of employees and the company's needs. Examples include an employer who had to reschedule courses for an orthodox Jewish mechanic to a time that did not conflict with his beliefs[79]. Sikhs have been exempted from wearing uniform to enable them to wear the kirpan[80], and employers and employees have been forced to negotiate arrangements to enable

employees not to work on Saturdays[81].

This accommodation effort obliges the employer to prove that he has really sought an arrangement with his employees. His obligation ends at the point where the arrangement imposes an excessive constraint on him. It is interesting that the "reasonable accommodation" requirement has been generalised to apply to all forms of discrimination since 1999[82].

The keynotes in reasonable accommodation are flexibility, cooperation and compromise[83].

This is certainly the approach that has been adopted by Community law concerning disabled persons with a view to fostering their integration in the workforce.

Nothing within the framework of examining the disproportionateness of occupational requirements or management measures would prevent the judge from introducing a general accommodation obligation based on the objectives of seeking to achieve social inclusion. General recognition of an obligation of means of inclusion in the fight against discrimination would be likely particularly to strengthen the protection of individuals suffering discrimination due to their state of health, their sexual orientation or, above all, their religion.

Recognition of such an obligation of means in Community case law would be based on examining the features of justifications, since the employer's requirements could be regarded as disproportionate if he has failed to mobilise all relevant resources with a view to an arrangement meeting the general objective of social integration. Within the scope of examining the necessity of justifications, we may also take the view, if this objective of inclusion becomes a priority, that an occupational requirement will never be necessary if a reasonable arrangement can be found.

French law has developed implicit obligations of means within the framework of the contract of employment in order to pursue specific employment objectives. These obligations concern the adaptation and rehabilitation that have been incumbent upon the employer since 1992 and have proved useful, in association with the contract of employment, in strengthening general policy on employment.

The development of an obligation of means of inclusion based on the obligation of seeking arrangements in good faith for employees disadvantaged for one of the reasons covered by Article L 122-45 would be wholly in the same vein.

This is already recognised where state of health is concerned, within the framework of the obligation to rehabilitate disabled persons, and could become generalised.

It would also be a way for the judge to limit the eminently relative approach to discrimination which, although resting on the logic of difference and anchored to a sociological approach to social reactions to difference, might quickly lead to a negation of the objective pursued.

The current construction of Community law, such as will in the years ahead be able to develop in all Member States, affords undeniable advantages. These include the general policy of fighting discrimination, fighting indirect discrimination and arranging the regime of the burden of proof to allow Member States, even the most reluctant, to take effective legal action against discrimination.

However, scrutiny is based on the vigilance of judges and on the balance to be struck by reasoned conclusions between differences in treatment and objective justifications.

We must of course not give in to the very French attitude of mistrusting the national judge. And while it is true that the Anglo Saxon countries and those under the influence of Anglo Saxon law have a habit of using legal standards, particularly the criterion of what is "reasonable", all EU countries also have an approach in terms of standards that is favoured by the application of Community rules. It is therefore not a matter of putting oneself in the judge's shoes, but of European harmonisation.

The struggle against inequalities in treatment is undoubtedly a jewel in the crown of the social construction of the Community. It simply needs refining further on a Community-wide basis by a common orientation towards the social integration of groups disadvantaged by discriminatory acts, so that the examination of justifications does not go in a direction opposite to that which may be intended within the framework of EU action programmes or of positive action undertaken by States.

But we could also go further. It has been remarkably well demonstrated [84] that the principle of equality in the construction of Europe has acquired an across the board social value, enabling the construction of a social Community. It is "an objective in itself, a sign of Community commitment to the protection of fundamental human rights".

Major legal constructions should take place in small steps.

These include the scrutiny of justifications of discrimination.

Notes

1 S. Robin-Ollivier, Le principe d'égalité en droit communautaire, Etude à partir des libertés économiques, P. U. d'Aix-Marseille, 1999, 550 p. .

2 See the preambles to Directive N°2000/43 EC of 29 Juny 2001 on the implementation of the principle of equality of treatment between individuals without distinction of race or ethnic origin and Directive N° 2000/78 of 27 November 2000 on the creation of a general framework in favour of equality of treatment in employment and at work

3 S. Robin-Olivier, op.cit. p. 415–485, F. Baron, Marché intérieur et droit social dans l'Union européenne, P. U. d'Aix-Marseille, 1998, p. 225–280, and references, also P. Rodière, Droit social de l'Union européenne, LGDJ, 2nd ed., 2002, N° 261 etseq., B. Teyssie, Droit européen du travail, Litec, 2001, p. 216–247

4 Texts on discrimination have been strongly influenced by North American and English law. Studies of comparative law carried out by the Commission show that all the countries in the European Union have developed legislation on fighting discrimination based on their constitutions (or on a law such as the British law of 1998 on human rights) Rapport des dispositions juridiques des Etats membres pour combattre la discrimination, Commission européenne, Employment and Social Affairs, February 2000

5 Martha Minow Making all the difference, Cornell University Press, Ithaca, 1990, M. Mercat-Bruns, "Discrimination", Liaisons sociales, n° 14/2001,16/02/2001, on the different approach to equality in French law, M.T. Lanquetin, Geld, loc.cit.,p.13, A. Lyon-Caen, "Equality and difference in the legal system", in La place des femmes, publ. La Découverte, 1995 Research collection.

6 The definition is not exactly similar to that emerging from case law, M.T. Lanquetin, "The principle of non-discrimination", Droit ouvrier 2000, p. 186–193. In case law addressing the disproprotionate impact of a measure, difficulties have arisen concerning the use of statistics and the identification of groups, leading to a more flexible definition of disadvantage. On indirect discrimination, R. Rodière, op. cit., n° 266 ; P. Garenne, "Indirect discrimination : towards a general theory" RTDE 1994, p.

425 ; D. Martin, "Discrimination, hindrances and imperious reasons of general interest: three concepts in search of identity" Cah.dr.eur. 1998,261 and 561

7 M.T. Lanquetin, "Discrimination on the grounds of sex, Commentary on Directive 97/80 of 15 December 1997", Droit social, 1998, p. 688, "A turning point in proving discrimination ", Droit social 2000, p. 589, GELD Le recours au droit dans la lutte contre les discriminations: la question de la preuve, October 2000, note n°2, M. Miné, "Discrimination in employment", La Semaine sociale Lamy suppl., N° 1055, 17/12/2001

8 M.T Lanquetin, loc.cit.

9 M. Miné, loc.cit. , Liaisons sociales, N° 8232, 29 November 2001

10 P. Rodière, op. cit., n° 267

11 On the general question of justifications, F. Guiomard, La justification des mesures de gestion du personnel, thesis, Paris X Nanterre, 2000

12 ECJ 13/05/1986, Bilka, case C-189/84, ECR 1607

13 The Court of justice has sought to diminish the importance of statistical criteria since the Regina/Seymour ruling, 9 February 1999, case C-167/97, TPS 04/99 p. 24 note P. H. Antonmattei

14 Danfoss ruling cit.

15 Bilka ruling cit.

16 Kisammer-Hack ruling, 30/1993, case C- 189–91, ACR p. 122, more generally on the subject of remuneration, summarising justifying facts accepted by case law, "Equality of remuneration in the light of ECJ case law", RRJ 2000/1, p. 301

17 S. Robin-Olivier, op. cit., p. 479 etseq.

18 Rinner-Kühn ruling, 19 July 1989, ECR I- 5535

19 Nimz ruling, case 7 February 1991, C- 184/89, ECR I-314

20 27/10/ 1993, C- 127/92, ECR p. 5566

21 ECJ 30 March 2000, Jämstalldhetsombudsmannen,

22 ECJ 17 October 1989, Danfoss, case 109/88, ECR p. 3220, ECJ 2 October 1997, Gerster

23 Y. Leroy, "Elements of assessment of discrimination in equality between men and women", Droit ouvrier 2000, p. 229

24 Y. Leroy, loc. cit. p. 234

25 Nolte ruling, 14/12/85,C 217-93, ECR I- 4625

26 Kachelmann case, cit. infra

27 ECJ 21/10/1999, case C-33/97, Europe 1999, n° 414

28 For the elimination of benefits on the occasion of maternity leave regarded as absenteeism or as direct discrimination, Cass 30 March 1984, Droit social 1984, obs. M.A. Moreau, and Cass. 16 July 1998; M. Mine, "Community law in the practice of social law, Droit ouvrier 2000, p. 97

29 R. Townshend-Smith, "Economic defences to Equal Pay claims", in K.T. Hervey, D. O'Keefe, Sex equality law in the European Union, publ. John Willey and sons, Chichester, 1996, p. 96, argument developed by F. Guiomard, thesis cit. p. 368

30 See below

31 F. Guiomar, thesis cit, this point may be of great importance, particularly for discrimination linked to sexual orientation, on the difficulties in Community law before 2000, B. Guiguet, "Community law and the recognition of partners of the same sex", Cahiers de droit européen 1999, p. 537

32 Indirectly, this obligation to announce a management policy justifies the practice of the "testing" of situations in the area of discrimination on the basis of race or belonging to an ethnic group: concerning discriminatory access to a discotheque, Crim. 12 September 2000, M. Miné, loc. cit. On the difficulty of defining legally the category discriminated against, M. Miné, "Legal approach to racial discrimination at work: a comparison between France and the United Kingdom, Travail et Emploi, September 1999, p. 99

33 Enderby ruling, cit.

34 Danfoss ruling, cit.

35 Lewen ruling cit.
36 M. Miné, loc.cit.
37 X. Philippe,
38 See below for a more dynamic interpretation of the criterion of proportionateness
39 ECJ 7/12 ? 2000, case C- 79-99 Schorbus, ECR I-
40 See below
41 M. T. Lanquetin, loc.cit.,
42 Expression used in the Geld report, op.cit. p 22, which stresses that in France there have been only two Supreme Court rulings in 10 years concerning racial discrimination. The list set out at the end of the report of judgements at first instance or on appeal comprises almost exclusively cases of discrimination in recruitment where evidence was provided by witnesses or sometimes in writing by the employer (departmental memorandum, posters)
43 Geld report cit., Cass 14 June 2000 and Cass 23 November 2000 cit., reported in la Semaine sociale Lamy, suppl n° 1055, cit. p. 47
44 See below part II
45 In spite of very recent significant changes.
46 J. Gerkrath, “The principle of equality of treatment and female access to jobs in army units of the Bundeswehr, Europe, December 2000, p. 5. This possibility of reservations is not without impact, given the strong reactions in Germany to the Kreil ruling.
47 F . Guiomard, thesis cit, p. 329 etseq.
48 Article L 123-1 of the Employment Code only covers the determinant condition.
49 Cass 27 November 1986, Droit social 1987, p. 379, obs. J. Savatier, JCP ed. G 1987 II 20798, note Th. Revet, Cass. Soc. 17 April 1991, Droit social 1991,p. 489, obs. J. Savatier, “redundancy is permissible where the objective cause is based on the behaviour of an employee who, taking account of the nature of his functions and the company’s business, has caused trouble within the company”
50 A. Jeammaud, J. Pelissier, A. Supiot, Droit du travail, Dalloz, n° 368
51 Law 91-663 of 13 July 1991 containing various measures to encourage access for disabled persons to residential premises, places of work and facilities open to the public
52 Agency that collects contributions from employers who fail to meet the obligation of having 6% of disabled personnel, and organises funding for all social inclusion projects for disabled persons
53 On the plentiful case law, A. Jeammaud et alii, op. cit. n° 368 etseq., for a summary, S. Bourgeot, Sickness and Unfitness, RJS 1/ 00, p. 10
54 Article L 323-8 of the Employment Code, arrangements must include at least two out of the four measures cited of recruitment plan in ordinary working environment, rehabilitation and training programme, plan for adapting to technological change, plan for retention in the company in the event of redundancy
55 This Article of the Law of 16 November 2001 therefore focuses precisely on the features that all the justifications must have, which the Law only specifies for reasons of age
56 ECJ 15 December 1994, Stadt Lengerich case, C- 399-92, ECR I p. 5727
57 S. Robin-Olivier, op. cit; p. 482
58 Seymour-Smith case, 9 February 1999, case C- 167/97, ECR I- p. 5566
59 Submissions 14 March 2000, ECR I 7507 point 33
60 Gerster ruling C- 1–95, ECR I-p. 5253
61 H. Motulsky, Principes d’une réalisation méthodique du droit privé, Sirey, 1948, p. 87, on the discussion, F. Guiomard, thesis cit. p. 115 refuting this approach
62 Within the framework of redundancy law, F. Favennec-Hery, La preuve en droit du travail thesis Paris-X, 1983, Droit social 1985, p. 172
63 Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), cited by M. Mercat-Bruns, loc.cit., Liaisons sociales n° 14/2001, D. Proulx, Les discriminations dans l’emploi: les moyens de défense selon la Chartre québécoise et la loi canadienne, publ. Y. Blais, 1993

64 Articles L 123-1 and L 122–42
65 Droit social 2001, p. 314, obs. C. Radé
66 Crim 14 June 2000 cit. M. Miné, loc. cit. p. 10
67 Cass 4 July 2000, Droit social 2000, p. 919, obs. J. Mouly, Droit Social 2000, p. 1152, obs. M.T. Lanquetin
68 Cit.
69 Cass 23 November 1999 and Cass 28 March 2000, Droit Social 2000 p. 593, M. T. Lanquetin, loc. cit.,M.T. Aubert-Monpeyssen, JCP ed. E février 2000, p. 233
70 F. Guiomard, thesis cit.
71 Droit social 2001, p. 566, obs. Radé
72 Fundamental discussion of the construction of the legal rule, which will not be gone into further here
73 See above
74 A. Haquet, "Positive action as an instrument for equality of opportunity between men and women", R.T.D. eur. 37 (2) April – June 2001, p. 325, J. Hodges,"Positive action in employment", R.I.T. 1999, p. 271, M. Schmit, "A new approach to occupational equality: positive action" Droit ouvrier 2001, p. 56
75 Tendency also seen in case law acceptance of legislation providing for positive action in favour of women: most recently, Abrahamson, 6 July 2000, C- 407/98
76 See above
77 D. Proulx, op. cit. p. 73 etseq.
78 D. Proulx op. cit ; p. 73 etseq, citing many examples and analysing in detail the judicial assessment of excessive constraints that limit the employer's obligation.
79 Sehdevc.Bayview Glen Junior School (1988) 9 CHRR D/4881 (Ontario)
80 Pandori v. Peel Board of Education (1990) 12 CHRR D/ 364 (Ont)
81 Gomm v. Domtar (1990) 12 CHRR D/ 161 (Ont)
82 British Columbia v. BCGSEU, 9 September 1999, CSC. N° 26274, for a quantitative assessment of the role of reasonable accommodation, C. Robert and G. Vallée, "The treatment of complaints of discrimination in employment by the ombudsman and the court of individual rights of Quebec: an exploratory comparative study., Les Cahiers de droit, vol. 41, March 2000, p. 95
83 Summary of D. Proulx cit.
84 S. Robin-Olivier, op. cit., the Defrenne ruling also stated that equality of treatment is one of the fundamental human rights