

ANALYSIS OF INDIRECT AND ASSOCIATIVE DISCRIMINATION IN EMPLOYMENT FROM THE EUROPEAN UNION LAW PERSPECTIVE

Summary

The paper deals with the issues of indirect and associative discrimination in the European Union law, with focus on the case law of the European Court of Justice, and the importance of the case law of this court for the sphere of employment. While prohibition of indirect discrimination was introduced in the European Union law a couple of decades ago, associative discrimination at the European Union level is, so far, addressed only by the European Court of Justice. In this regard, the concept of associative discrimination is still, to some extent, vague and subject to debate, while the dilemmas and risks in relation to this concept exponentially grow when reflected upon through lenses of indirect discrimination. The goal of the paper is to point out the importance, but also the risks of recognizing indirect associative discrimination in employment, all in the context of taking one step further in achieving substantive equality in the world of work.

Keywords: Employment, indirect discrimination, associative discrimination, European Union law, European Court of Justice.

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RAZMATRANJE POSREDNE I PRENESENE DISKRIMINACIJE U SFERI ZAPOŠLJAVANJA I RADA IZ UGLA PRAVA EVROPSKE UNIJE

Sažetak

Rad se bavi posrednom i prenesenom (asocijativnom) diskriminacijom u pravu Evropske unije, sa posebnim fokusom na sudsku praksu Evropskog suda pravde i značaj sudske prakse ovog suda za sferu zapošljavanja i rada. Zabrana posredne diskriminacije je prisutna već decenijama u pravu Evropske unije, dok je prenesena diskriminacija, na nivou Evropske unije, i dalje prisutna samo u praksi Evropskog suda pravde. Stoga koncept prenesene diskriminacije i dalje ostaje u velikoj meri podložan razmatranju i debati, dok broj pitanja i nedoumica znatno raste kada se ovaj koncept posmatra kroz prizmu posredne diskriminacije. Cilj rada jeste da ukaže na važnost prepoznavanja prenesene diskriminacije kao posredne u sferi zapošljavanja i rada, ali i na rizike u vezi sa ovim konceptom, a sve u kontekstu koraka napred ka postizanju suštinske jednakosti u svetu rada.

Ključne reči: zapošljavanje i rad, posredna diskriminacija, prenesena diskriminacija, pravo Evropske unije, Evropski sud pravde.

1. Introductory Remarks

The principle of equality and prohibition of discrimination is one of the fundamental principles that the labour law is built upon and therefore a platform based on which and out of which labour law guarantees arise. Even though it is a principle widely recognized and guaranteed in many legal instruments at different levels, the paper shall focus on the European Union (EU) law.¹ In this sense, it is important to have in mind the wider context relating to the EU and to emphasize that *dignity*, *human rights* and *equality* are considered to be among the key values of the EU (Art. 2 of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007).

¹ It is important to have in mind that the concept of discrimination has been defined and framed, to some extent, differently in different legal instruments (Makkonen, 2002, p. 4). Certainly, recognizing different forms in which discrimination may occur represents a great step forward in development of non-discrimination principle. In that sense, regarding discrimination in employment in the United States of America, Reljanović (2009, pp. 111-112) notices that, despite the existence of a developed system aimed at prohibiting discrimination, the last decades show us that discrimination continues to evolve and appear in new and different forms.

Today's EU is considered to be a symbol of a developed legal system that guarantees non-discrimination and equality, and such a position is a consequence of a development that lasted, and continues to last, for decades. Throughout this development, the role of the European Court of Justice (ECJ) has been a crucial one, and a clear example of the said can be found in introducing equality between men and women in employment. Namely, the first thoughts on introducing prohibition of discrimination and equality between men and women actually referred to considering equal pay for men and women for performing equal work due to reasons of unfair competition. What happened is that, France that had already introduced such a guarantee, was concerned whether the fact that the Benelux countries have not done the same, would reflect on the prices in the textile industry and create unfair competition. In order to prevent and address such legitimate concerns, the guarantee of equal pay for equal work performed by men and women was introduced in the founding treaties.² However, it was the ECJ that has, in the landmark case *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena* (No 2) (Judgment of the Court of 8 April 1976, Case 43-75, ECLI:EU:C:1976:56) took the stance that this guarantee was to be considered to have a direct effect and that it reflects not only economic goals, but also social progress and improvement of living and working conditions of people, as goals of the EC (today's EU).³ In that regard, it can be stated that equality in the EU was at first considered from the economic point of view, while the development in this regard has led to equality in employment and in general being the core principle of today's EU (Kovačević, 2021, pp. 1018-1020).⁴

One aspect of the development, relating to prohibition of discrimination and equality, refers to introducing the distinction between direct and indirect discrimination in Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex (hereinafter: the Directive). On the other hand, a relatively new aspect of such a development can be found in introducing the concept of associative discrimination, i.e., discrimination by

² More precisely, it was introduced as Art. 119 of the Treaty establishing the European Economic Community, which is today Art. 157 paras. 1-2 of the Treaty on the Functioning of the European Union.

³ As stated in the para. 10 of the Judgement and in relation to guarantee of equal pay "this provision forms part of the social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples, as is emphasized by the Preamble to the Treaty".

⁴ It can be argued that measuring the understanding and existence of discrimination in a certain society, and in different spheres, including the sphere of employment, speaks of the (lack of) guarantees of all human rights and democratic values (Petrović, 2014, p. 416).

association and prohibiting such discrimination by the ECJ. Precisely the relation between the two concepts – on one hand *direct and indirect discrimination*, and on the other *associative discrimination*, shall be the focus of the paper.⁵ The said is going to be analysed in regard to employment, as the existence of discrimination in this sphere is especially emphasized.⁶ The first part of the paper shall focus on indirect discrimination, while the second shall address in more detail the issue of associative discrimination. Based on the detailed analysis of these two forms of discrimination, the latter parts of the paper shall analyze the issue of indirect associative discrimination, with the hypothesis that associative discrimination can be both direct and indirect. Certainly, such form of discrimination is not always easy to recognize in practice, however the case law of the ECJ suggests, and it can even be said, proves that such discrimination can exist. Further on, the paper aims to prove the necessity to address the issue of indirect associative discrimination in employment, in striving towards substantive equality in the world of work.⁷

⁵ It is interesting to mention that, from a strictly linguistic point of view, both indirect and associative discrimination are, in a certain aspect, indirect. In that sense, associative discrimination can be considered indirect in terms of the person that is subject to discrimination. However, this is not the approach taken in the EU law or generally in law instruments (Tobler, 2008, p. 51).

⁶ Statistical data from the EU confirm this. For example, research conducted by Eurostat from 2021 shows that “5.2 million women and 3.6 million men aged 15-74 in the EU reported feeling discriminated against at work. The difference between those two numbers was mainly due to the difference in the number of those who reported feeling discriminated against based on gender: 0.2 million men compared with 1.6 million women” (Eurostat, 2022, para. 2). The same research points out the emphasized discrimination of migrants as well. Discrimination in employment the EU manifests in different employment rates based on gender, but also other personal grounds, gender, race and other pay gaps, the existence of “glass ceiling” and “sticky floor”, and in many other ways. And while discrimination in one sphere negatively affects the individual, as well as the society in general, the root causes of discrimination are to be found in stereotypes and prejudices, i.e., many issues outside the law (Gligorić & Stojković Zlatanović, 2020, p. 33).

⁷ Taking a step back demonstrates that even though equality was being thoroughly discussed far back in the 18th century, the notion and concept of equality has since “embarked on a long journey in legal orders, moving from a purely formal concept to a principle of substantive equality [...] Equality in law was a purely formal concept, until specific criteria, based upon which differentiation is excluded, were established in law” (Cottier & Oesch, 2011, p. 5). In relation to that, when addressing substantive equality Fredman (2016, p. 712) states the following: “the limitations of a formal interpretation of the right to equality are now well recognized. However, the meaning of substantive equality remains deeply contested [...] the right to substantive equality should not be collapsed into a single formula, such as dignity, or equality of opportunity or results. Instead, drawing on familiar conceptions, a four-dimensional approach is proposed: to redress disadvantage; address stigma, stereotyping, prejudice, and violence; enhance voice

The key methods that shall be applied are the conceptual analysis, as well as the normative and comparative method, focusing on the EU law, while the inter-sectional method shall be mentioned as well.

2. Indirect Discrimination in Employment from the European Union Law Perspective

For decades, the EC/EU has been a pioneer in introducing new guarantees and recognizing challenges related to discrimination in practice, while the role of the ECJ in this sense is key. That being said, a great step forward refers to recognizing direct and indirect discrimination, as sort of counterparts, in the Directive, while it is considered that the Directive has, in fact, codified the concepts recognized in the case law of the ECJ (Wengdah, 2001, p. 14).⁸ Even though the Directive is no longer in force, it has introduced a generally accepted definition of indirect discrimination in EU law, primarily related only to sex, and later on, to other personal grounds as well. Namely, as stipulated by the Art. 2 para. 2 of the Directive, indirect discrimination exists “where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex”. Such a guarantee refers to, among other issues, wages and conditions of employment and work, while it is also recognized that indirect discrimination is more difficult to prove. The definition provided by the Directive was further reinforced by directives currently in force.⁹ While direct discrimination refers to a less favourable treatment

and participation; and accommodate difference and achieve structural change. This reflects the principle that the right to equality should be responsive to those who are disadvantaged, demeaned, excluded, or ignored.”

⁸ In that regard, the famous case *Bilka - Kaufhaus GmbH v Karin Weber von Hartz* (Judgment of the Court of 13 May 1986, C-170/84, ECLI:EU:C:1986:204) referred to a situation in which part-time workers were excluded from a pension scheme, while most part-time workers were women meaning that this rule has disproportionately affected women, so the question regarding the potential indirect discrimination based on sex was posed. The ECJ took the stance that “the exclusion of part-time workers from the occupational pension scheme would be contrary to Article 119 of the Treaty where, taking into account the difficulties encountered by women workers in working full-time, that measure could not be explained by factors which exclude any discrimination on grounds of sex” (para. 29). On the contrary, “if the undertaking is able to show that its pay practice may be explained by objectively justified factors unrelated to any discrimination on grounds of sex there is no breach of Article 119” (para. 30).

⁹ Indirect discrimination is clearly prohibited in Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic

in a comparable situation that is obvious, in cases of indirect discrimination there is an *appearance of neutrality*. However, the very existence of indirect discrimination points out that certain provision, criterion or practice is not in fact neutral in its effects (Kovačević, 2013, p. 395).¹⁰ On the other hand, as confirmed by EU directives, there is no indirect discrimination if a certain measure is necessary and appropriate, while the aim is legitimate. So, in order to establish whether certain measure is in fact neutral or discriminatory, it is necessary to take the test of proportionality.¹¹

It can be stated that, while direct discrimination is overt, even visible at the “first glance”, indirect discrimination cannot be recognized until assessing the *effects* in a particular situation and therefore is considered to be an effects-based concept (Canotilho, 2013, p. 265). In other words, indirect discrimination puts the focus on differential effects rather than the differential treatment (Liddell & O’Flaherty, 2018, p. 56). The importance of introducing the concept of indirect discrimination in EU labour law can be summed up in three key points. Firstly, it urges us to analyze the effects of a certain provision, criterion, or practice, and therefore prevents, or at least minimizes, the possibility of the employer to violate legal norms by introducing only an appearance of neutrality. Secondly, it highlights not only the individual experience of the victim of discrimination, but also the fact that the victim is a part of a vulnerable group that the employer puts into a disadvantaged position. Finally, it contributes to a more comprehensive system of prohibition of discrimination in employment, which represents a step forward and an encouragement for further development of guarantees in this regard. In relation to the mentioned, understanding indirect discrimination seems to be particularly important today, having in mind the great “popularity” of such discrimination in employment due to “rising pressure to appear egalitarian” (Jones *et al.*, 2017, p. 51).

origin, (Art. 2 para. 2 subpara b), Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Art. 2 para 2 subpara. b), as well as 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) (Art. 2 para. 2 subpara b) and Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC (Art. 3 para. 1 subpara. b).

¹⁰ Therefore, finding that indirect discrimination has occurred requires a detailed analysis of the particular context in each case (Maliszewska-Nienartowicz, 2014, p. 42).

¹¹ The *Bilka - Kaufhaus GmbH v Karin Weber von Hartz* was also of crucial importance in introducing this test which was later developed through case law of ECJ and incorporated in Directive 2000/43/EC.

No matter how clear and precise a certain definition may be, sometimes there are blurred lines in terms of whether discrimination exists in a particular case, and if so, in which form. The ECJ has dealt with such issues in relation to different protected personal grounds in its case law. For example, in *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* (Judgment of the Court (Grand Chamber) of 14 March 2017, Case C-157/15, ECLI:EU:C:2017:203), the applicant was dismissed because she refused to stop wearing a headscarf despite the employer's internal rule aimed at preserving an image of neutrality political, philosophical or religious signs in the workplace. Even though the ECJ has found there was no direct discrimination in the case at hand, it took the stance that "it is not inconceivable" for the referring court to determine that this rule in fact has a disproportionate effect that would indicate the existence of indirect discrimination (para. 34).¹² Furthermore, it is interesting to mention that indirect discrimination in employment is often discussed and even confused with other concepts such as *positive action* or *reasonable accommodation*. On that note, it should be underlined that positive action refers to introducing temporary measures that give priority to a certain group in order to correct the structural inequalities deeply rooted in history in a proportional and adequate manner (De Vos, 2007, pp. 9-14). The notion and concept of such measures is, to this day, highly disputed, however, that basic idea behind this concept can be found in the understanding that only prohibiting discrimination is not sufficient if the goal is substantive equality (Kostić, 2023, pp. 322-324). Certainly, both prohibition of (indirect) discrimination and positive action have the same goal, that is achieving equality in practice (Jovanović, 2018, p. 2). The potential space for confusion and even controversy between the two refers to the question in which situations differential treatment and effects are justified, as they are justified when it comes to positive action and unjustified in cases of indirect discrimination (Bell & Waddington, 2011, pp. 1503-1526). Regarding reasonable accommodation, it refers to providing adjustments and modifications that make the workplace suitable for employees based on their needs, and this concept is primarily related to persons with disabilities (Grgurev, 2022, pp. 34, 42).¹³ Therefore,

¹² The epilogue of this case was that no existence of discrimination was established. On one hand, the judgment of the ECJ in this case is often praised for opening the door for considering indirect discrimination. On the other hand, it is also often criticized for taking such an ambiguous stance which at the end led to an epilogue this case had (Spinoy & Vrielink, 2021). On the other hand, in the *Brian Francis Collins v Secretary of State for Work and Pensions* case (Judgment of the Court (Full Court) of 23 March 2004, C-138/02, ECLI:EU:C:2004:172), the ECJ addressed the issue of discrimination by nationality and took the stance that requiring a person to have habitual residence in order to claim jobseeker allowances can be considered indirect discrimination.

¹³ This syntagma is used in Art. 2 para 4. of the *Convention on the Rights of Persons with Disabilities* (UN General Assembly, 24 January 2007, A/RES/61/106) where it is stipulated that reasonable

reasonable accommodation should by no means be confused with indirect discrimination. However, addressing failure to provide reasonable accommodation is especially important when it is a consequence of a seemingly neutral rule, which speaks of the close connection between the two (Donegan, 2020, p. 170).

3. Introducing the Concept of Associative Discrimination in Employment in the European Union Law

No matter how developed the norms prohibiting discrimination are, the reality, that points out the existence of discrimination, always seems to indicate the need to introduce new concepts in order to address challenges in practice (Sánchez-Girón Martínez, 2021, p. 115). In that sense, if the role of the ECJ is to be considered greatly significant in developing the concept of indirect discrimination, it is at least as great when it comes to associative discrimination. Namely, the concept of associative discrimination was firstly addressed in the employment law case *S. Coleman v Attridge Law and Steve Law* (Judgment of the Court (Grand Chamber) of 17 July 2008, Case C-303/06, ECLI:EU:C:2008:415) (hereinafter: the Coleman case). Ms. Coleman, who was employed as a legal secretary, referred her case to the Employment Tribunal in the United Kingdom, stating that she was forced to resign her job where she was being harassed and denied flexible working hours granted to other employees. She claimed that she was exposed to such a treatment not because of a personal characteristic of her own, but because of her son Oliver, who was born with a rare medical condition which has affected his hearing and breathing, i.e., is a person with a disability. Given the fact that she has accommodation refers to “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms”. In this respect, it is relevant to mention that, for a long time, persons with disabilities were employed through sheltered employment, while such a principle of employing persons with disabilities in special, separated workplaces, was based on the medical model of disability (Kovačević, 2022, pp. 333-342). On the other hand, the idea of reasonable accommodation is related to, today widely accepted, social model of disability, which focuses on the fact that persons with a certain impairment are often put in a position of disadvantage by the society. In relation to that, the case law of the ECJ also plays a great role in guaranteeing reasonable accommodation and an especially interesting case in this sense is the *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S* (Judgment of the Court (Second Chamber) of 11 April 2013, Joined cases, C-335/11 and C-337/11, ECLI:EU:C:2013:222). In this case, the reason for a dismissal of an employee was an absence related to disability and the ECJ has interpreted the guarantee of reasonable accommodation in a very wide sense by taking the stance that it also refers to shortening the working hours, i.e., working time.

relied on Directive 2000/78/EC, as well as the national law, the Employment Tribunal referred this case to ECJ. The ECJ supported Ms Coleman's claim by taking the stance that she was subject to discrimination because of her son. In other words, the ECJ has recognized the existence of *direct associative discrimination*. What is especially interesting is that the ECJ has not qualified this situation as discrimination based on family responsibilities but based on disability.

The Advocate General (AG) Miguel Poiares Maduro (Opinion of Mr. Advocate General Poiares Maduro, delivered on 31 January 2008, EU:C:2008:61) emphasized that, in order for discrimination to be considered existing in this case, it is not necessary for Ms. Coleman to be put in a position of disadvantage based on "her disability", but only on the "account of disability" (para. 23), i.e., her son having a disability.¹⁴ Besides disability, the effects of the Coleman case also refer to introducing the concept of associative discrimination into consideration in regard to other personal grounds (Wacher, 2020, p. 397).¹⁵ Furthermore, such a stance of the ECJ has had an effect regarding national legislations of the EU member states. This effect is perhaps the most visible when it comes to United Kingdom, which was, at the time, an EU member state, as the prohibition of associative discrimination was introduced into the UK's Equality Act from 2010.¹⁶

¹⁴ AG Maduro has referred to the Directive 2000/78 EC, emphasizing that discrimination in this case is direct discrimination. Also, the AG expressed the stance that "one way of undermining the dignity and autonomy of people who belong to a certain group is to target not them, but third persons who are closely associated with them and do not themselves belong to the group" (para. 12).

¹⁵ It should be mentioned that such a stance of the ECJ has also been important when it comes to recognition of associative discrimination in case law of other courts. In this sense, the European Court of the Human Rights (ECtHR), in the case *Guberina v. Croatia* (App. no. 23682/13), took the stance that Art. 14 of the European Convention on Human Rights also guarantees prohibition of associative discrimination. Namely, this was a tax law case in which the applicant, who lived with his family in Croatia, had a disabled son. Due to this fact, the family moved to an accessible apartment, requesting the exemption from paying tax that existed for the ones who have housing needs. The ECtHR ruled in favour of the applicant and what makes this case especially important is that the ECtHR has clearly stated the following: "It thus follows, in the light of its objective and nature of the rights which it seeks to safeguard, that Article 14 of the Convention also covers instances in which an individual is treated less favourably on the basis of another person's status or protected characteristics" (para. 78).

¹⁶ It is interesting to mention that the Equality Act does not mention explicitly associative discrimination. However, it is the wording in a definition of direct discrimination that is interpreted as protecting against associative discrimination as well. For more about this see Government Equalities Office & Equality and Diversity Forum, 2010, pp. 1-6. In light of the mentioned, it is observed that the issue of associative discrimination has, in the UK, been discussed and addressed more implicitly for quite some time, until the clear stance of the ECJ in the Coleman case (De Gioia-Carabellese, Colhoun, 2012, pp. 247-248). The prohibition of associative

Albeit the decision in the Coleman case is of great importance, it does not mean that there are no issues that remain unsolved. Some of the concerns that have arisen refer to the degree of the closeness of the relation between the two persons in order for discrimination to be considered associative. In other words, in the Coleman case, there was a primary career, but the ECJ did not specify would this have been considered a case of associative discrimination had the relationship between Ms. Coleman and her son not been that close (Devan, 2012, p. 228). The importance and scope of this question is great, as it shapes the core of the concept of associative discrimination. While a definite answer cannot be given and the circumstances of each particular case must be assessed, the very existence of such a question speaks of the risk that this concept bears with itself and that we must be aware of. This risk refers to claiming discrimination based on *any* association that a person has with another one.¹⁷

Another issue that needs to be taken into account, from the employment law perspective, is the relation between associative and *perceptive discrimination*, i.e., discrimination based on a perception that a jobseeker or an employee belongs to a certain group, as the goal of labour law is to protect based on both existing and perceived personal characteristics (Kessler, 2018, pp. 1-6). However, in cases of perceptive discrimination there is no association, but a perception that a person has a certain protected characteristic, i.e., belongs to a certain group or has a certain belief.

Further on, understanding associative discrimination in the world of work requires considering the relation between associative discrimination and

discrimination was introduced not only in the UK law, but also to some other legislations such as the Spanish disability legislation (Real Decreto Legislativo 1/2013, de 29 de noviembre, por el que se aprueba el Texto Refundido de la Ley General de derechos de las personas con discapacidad y de su inclusión social).

¹⁷ Besides the mentioned, it is also interesting to take into account that associative discrimination is often reflected from a perspective outside the law, i.e., issues that leave the area of labour law and law in general but are at the same time closely related to law. That is especially true when discussing the interplay between affinity profiling, targeting and the concept of associative discrimination. Namely, affinity profiling refers to “grouping people according to their assumed interests rather than solely their personal traits, that has become commonplace in the online advertising industry” (Wachter, 2020, p. 367). In this regard, “through data mining and the use of artificial intelligence tools for profiling and clustering, people may be grouped based on collective characteristics that may not accurately represent their individual features, resulting in differential treatment regardless of whether legally recognised vulnerable groups are involved. It therefore becomes crucial to question to what extent associative discrimination can effectively address this discriminatory power or whether new measures need to be developed to safeguard personal autonomy and prevent the proliferation of such phenomena in the current digital landscape” (Costa, 2023, p. 5).

discrimination based on multiple grounds, especially intersectional discrimination. Namely, what is similar for both associative and intersectional discrimination is that both concepts are rarely or not at all explicitly in primary and secondary EU law.¹⁸ A common trait of both can also be found in the fact that it is necessary to comprehensively understand the context in every particular case in order to recognize the existence of discrimination. Furthermore, it is emphasized that the concept of intersectional discrimination requires us to have more solidarity with each other, while the same can be stated for associative discrimination (Mršević, 2020, p. 79). However, the mentioned similar aspects do not put to question the fact that associative discrimination and intersectional discrimination are decisively different concepts. Contrary to having an association, in cases of intersectional discrimination there are multiple grounds of discrimination that intersect, resulting in a synergistic effect related to the person being subject to discrimination (Crenshaw, 1989, pp. 1241-1299). When discussing these concepts, it is relevant to have in mind the somewhat different approach of the ECJ. Namely, in the Coleman case, the ECJ has provided protection by relying on the Directive 2000/78/EC, even though associative discrimination is not explicitly mentioned. On the other hand, the case law of the ECJ speaks of the fact that the Court has not interpreted the mentioned and other EU directives in such a broad manner when it comes to intersectional discrimination. For example, in the *David L. Parris v Trinity College Dublin and Others* (Judgment of the Court (First Chamber) of 24 November 2016, Case 443/15, *David L. Parris v Trinity College Dublin and Others*, ECLI:EU:C:2016:897), that has dealt with the issue of survivor's pension that was denied to a same-sex civil partner, the applicant claimed discrimination based on both sexual orientation and age and relied on the Directive 2000/78/

¹⁸ While associative discrimination is only recognized in the case law of the ECJ, in the last couple of years, the issue of intersectional discrimination is becoming more present in EU's legal instruments. In that sense, when it comes to discrimination based on multiple grounds, as a more general term, it is important to say that the preambles of the Directives from the year 2000 (para. 14 of the preamble of the Directive 2000/43/EC and para. 3 of the preamble of the Directive 2000/78/EC), mention women as potential victims of multiple discrimination. Also, the issue of multiple discrimination is mentioned in the preamble of the Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union (para. 10). When it comes to intersectional discrimination, it is explicitly mentioned in the Directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms (Arts. 3, 16 and 23), while the European Parliament resolution of 6 July 2022 on intersectional discrimination in the European Union: the socio-economic situation of women of African, Middle-Eastern, Latin-American and Asian descent (2021/2243(INI), although non-binding, is completely dedicated to this issue.

EC.¹⁹ The ECJ found that there was no discrimination by clearly taking the stance that, if discrimination based on these grounds separately does not exist, there is no possibility of establishing a “new category of discrimination resulting from the combination of more than one of those grounds” (para. 80). The ECJ has had a similar approach in cases which dealt with wearing a headscarf in the workplace, as for example in the already mentioned case *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*. In such cases, the ECJ has failed to recognize the risk of intersectional discrimination based on intersection of religion, gender and race.²⁰

As the difference between intersectional and associative discrimination is addressed, it is important to, at least mention, the possibility of both concepts existing simultaneously. In that sense, it could even be argued that an intersectional perspective should be introduced in the Coleman case, as a woman, who is a mother of a child with a disability, was discriminated. Therefore, besides disability, gender and family responsibilities are also personal grounds that should be taken into account when dealing with this case. Certainly, at the moment, when both concepts are relatively new and, barely or not at all, recognized in the legal instruments at the EU level, this perspective seems miles away from the situation in practice. Nonetheless, such a direction of further thinking is certainly beneficial – introducing the intersectional dimension is one step further in development of the concept of associative discrimination, while the theory of intersectionality should also address the issue of association in discrimination cases.²¹

¹⁹ In more detail, the Irish court denied this right recalling that the law that guarantees the same rights to same-sex civil partnerships as to the married couples, was adopted a couple of years after the applicant turned 60, while this law guaranteed the right to pension if someone engaged in a civil partnership before the age of 60.

²⁰ The ECJ has also taken a similar stance in the *IX v WABE eV and MH Müller Handels GmbH v MJ* (Judgment of the Court (Grand Chamber) of 15 July 2021, Joined Cases C-804/18 and C-341/19, ECLI:EU:C:2021:594). However, in this case, the ECJ has recognized that prohibiting only large-size and conspicuous political, philosophical or religious signs in the workplace introduces the risk of creating an unequal treatment in regard to a certain religion.

²¹ When it comes to intersectional discrimination, intersectional approach is a crucial and a necessary tool in recognizing and addressing such discrimination. Namely, this approach was firstly conceived as a critique of an approach used in feminist and critical race theory and, over time, it has become the opposite of the single-axis (vertical) approach. While single-axis approach is focused on one personal ground as basis for discrimination, intersectional approach takes into account the more comprehensive image that incorporates dealing with identities, as well as privilege and subordination in a society (McCall, 2005, pp. 1771-1772). Even though this approach is primarily used in regard to intersectional discrimination, such intersectional “lenses” can also be valuable in addressing associative discrimination. That is true as “intersectional analysis provides grounds to understand various discrimination experiences and in

4. Associative Discrimination as Indirect – Collided or Complementary Concepts?

In the years following the judgment in the Coleman case, the discussions of whether associative discrimination could also be indirect have started to gain more attention. While introducing such possibility would be not only beneficial, but necessary in order to speak of substantive equality, at the same time there is a legitimate concern that it includes many risks and dilemmas, to say the least. Again, a great step which, to some extent answers the question whether associative discrimination can be indirect, was taken by the ECJ in the case “*CHEZ Razpredelenie Bulgaria*” *AD v Komisia za zashtita ot diskriminatsia* (Judgment of the Court (Grand Chamber) of 16 July 2015, Case C-83/14, ECLI:EU:C:2015:480) (hereinafter: the CHEZ case). What has happened in this case is that Ms. Nikolova, who is not Roma, had a shop in an area – “Gizdova Mahala” that was primarily populated by Roma people in a town on Dupnitsa in Bulgaria. In this particular area, the electricity meters were placed atypically high at six to seven meters above the ground which made it impossible for Ms. Nikolova, the applicant in this case, to monitor the consumption of electricity.²² Ms. Nikolova filed a complaint to Bulgarian Commission for Protection against Discrimination, complaining that she could not measure electricity consumption and that the effects of this measure are offensive and stigmatizing. In other words, her claim referred to discriminatory treatment due to the fact that the neighbourhood was dominantly populated by Roma people. Ms. Nikolova firstly referred her case to the Commission for Protection against Discrimination, and after an appeal, it was addressed by the Supreme Administrative Court that has referred the case to ECJ.²³ The ECJ took the stance that associative discrimination did in fact occur in this case (even though not using the such wording), despite the lack of close connection with the community in terms of race or ethnicity. The ECJ relied on the guarantees provided by Directive 2000/43/EC which are also supposed to “benefit persons who, although not themselves a member of the race or ethnic group concerned, nevertheless suffer less favourable treatment or a particular disadvantage on one of

doing so, it allows discriminations which have remained hidden and unnoticed under previous anti-discrimination approaches to be disclosed and revealed” (Massetot & Bullock, 2013, p. 13).

²² In more detail, the electricity provider CHEZ Razpredelenie Bulgaria AD has, in that area, put electricity meters at the height of six to seven meters, instead of 1.70 meters which was the standard height in other areas (para. 22).

²³ Interestingly, this case was at first addressed as dealing with indirect discrimination based on nationality by the Commission and the Commission concluded that no such discrimination has occurred, but an appeal to the Supreme Administrative Court led to re-examining nationality as the potential ground of discrimination and returning the case to the Commission (para. 25).

those grounds” (para. 56). ECJ left it to national court to decide whether discrimination in this case is to be considered direct or indirect (para. 79), therefore opening the possibility of considering indirect associative discrimination. What is more, it can be argued that certain passages of the judgment suggest that discrimination in this case was in fact indirect.²⁴ The AG, Juliane Kokkot, in her opinion (Opinion of Advocate General Kokott, delivered on 12 March 2015, ECLI:EU:C:2015:170), argues that the factual background does not provide sufficient evidence to establish the existence of direct discrimination (para. 87). However, the disadvantaged treatment that the population of Gizdova Mahala, including the applicant, is suffering, is related to ethnic origin in an indirect way (para 96). Even though not all population in this area is Roma, AG argues that comparison should not be made between within this district, but in fact between the position of the ones living outside and inside the district (para. 99). In that light, the AG clearly states that “it is fair to recognise the concept of ‘associative discrimination’ in connection with indirect discrimination in the same way as in connection with direct discrimination” (para. 106). The judgment, as well as the opinion of the AG, in the CHEZ case, is greatly significant due to multiple reasons. Besides its great importance in terms of recognizing the stigmatization and marginalization that the Roma people are exposed to in the EU (Benedi Lahuerta, 2016, p.

²⁴ In that regard, it is stated in para. 96 of the judgement that “indirect discrimination on the grounds of racial or ethnic origin does not require the measure at issue to be based on reasons of that type. As is apparent from the case-law recalled in paragraph 94 of the present judgment, in order for a measure to be capable of falling within Article 2(2)(b) of Directive 2000/43, it is sufficient that, although using neutral criteria not based on the protected characteristic, it has the effect of placing particularly persons possessing that characteristic at a disadvantage” and in relation to that “it follows from the foregoing that Article 2(2)(b) of Directive 2000/43 must be interpreted as precluding a national provision under which, in order for there to be indirect discrimination on the grounds of racial or ethnic origin, the measure in question is required to have been adopted for reasons of racial or ethnic origin” (para. 97). What is more, para. 103 stipulates that “in order to define both direct discrimination and indirect discrimination and thus to the same degree of seriousness, complies with Directive 2000/43, it need only be pointed out that it is apparent from the interpretation adopted in paragraphs 99 to 102 of the present judgment relating to Article 2(2)(b) of the directive that no particular degree of seriousness is required so far as concerns the particular disadvantage referred to in that provision. Accordingly, the fact that recourse is not had to such a criterion of seriousness in the abovementioned national legislation cannot give rise to a problem of compliance with the directive”. Finally, in para. 105, the Court concludes that “in this instance, assuming that the referring court comes to the conclusion that it is not established that the practice at issue amounts to direct discrimination on the grounds of ethnic origin, it must be stated that the facts as found by that court permit the view to be taken that such a practice displays the characteristics required to constitute indirect discrimination within the meaning of Article 2(2)(b) of Directive 2000/43 unless it can be justified in accordance with that provision”.

797), it has introduced a basis for considering indirect associative discrimination. In other words, the ECJ has, once more, “opened a new path for national courts to extend protection to certain conducts that had managed to remain invisible to legal treatment” (Maneiro Vázquez, 2021, p. 60).

The decision of the ECJ in the case at hand certainly has important repercussions when it comes to world of work, in the EU and globally. That being said, it should be highlighted that unjustified unequal treatment in employment is often a reflection of deeply-rooted structural issues and patterns that shall not cease to exist at once and easily (Smith, 2016, 99). Furthermore, discrimination in employment occurs in many forms based on different criteria, making it at times difficult to completely understand in which form(s) discrimination has occurred in the particular case. Also, one must take into account that the world of work is constantly changing, and that different factors not only influence but shape the contemporary world of work. Such factors primarily refer to globalization, which is bringing new possibilities with itself, but at the same time, is often resulting in growing violations of guarantees that form the concept of decent work (Kovačević Perić, 2013, p. 101).²⁵

Also, and in relation to the mentioned, there are increased rates of migration to the EU countries and while the system of protection and guarantees concerning migrant workers in the EU is quite broad and developed, at the same time, it misses consistency (Kovačević, 2020, p. 7).²⁶ Furthermore, digital economy and digitalization is influencing almost every aspect of employment in today’s world, changing the priorly existing boundaries and possibilities (Urdarević, 2021, p. 126). However, the rising trend of digitalization of work is also followed by a rising risk of precarisation (Reljanović & Misailović, 2021, pp. 407-410).

What is more, the situation in the EU is also shaped by crises of different nature that have a “common feature” of a devastating effect on employment, reflected in unemployment, underemployment and the worsened situation in terms of decent work (European Commission, 2023; International Labour Organization, 2022). The stated combined with neoliberal philosophy in employment, which is once again becoming more present and popular, leads to increased deregulation and destabilisation (Dokmanović, 2020, pp. 22-26). All of the mentioned factors speak of the added layers of complexity that shape today’s world of

²⁵ It is necessary to take into account that, in a globalized context, EU tends to reduce any welfare measures of social protection, while also easing the regulations for employers (Gasmi, Protić, 2017, p. 47).

²⁶ In that sense, there are still dilemmas and unresolved issues even with the term “migrant”, but also in relation to different guarantees and rights, while on the other hand migration rates are growing and carrying the potential for major social change (Urdarević, 2023, pp. 91-106).

work in the EU and the context in which (indirect) associative discrimination is to be introduced and considered in.

On the other hand, from a procedural point of view, it is also important to take into account many challenges related to claiming the existence of indirect associative discrimination. Firstly, the inequality between the sides in the employment relationship often makes it extremely difficult for victims of discrimination in employment to protect their rights in practice due to fear of the employer and the repercussions of making against the employer. Measures taken in this regard at the EU level, such as shifting of burden of proof, so that the claimant (applicant) in discrimination cases only needs to provide a *prima facie* evidence that discrimination has occurred, are definitely helpful (European Commission, 2014, pp. 9-24). However, even with that, claiming that discrimination has happened remains a difficult path, which is especially true when it comes to indirect discrimination, taking into account all of the previously mentioned challenges related to this concept. On the other hand, it is also particularly complex and difficult for victims of associative discrimination to protect their rights. The crucial challenge in this regard refers to a vague understanding of closeness of the relationship between two persons in order for discrimination to be considered associative. The existing questions and uncertainties relating to associative discrimination include the risk of opening the “Pandora’s box” of cases where there was in fact no discrimination. The mentioned is especially worrisome when we take into account the “expensive nature” of associative discrimination which widens the scope of protection from discrimination.

It can be concluded that establishing the existence of indirect associative discrimination in employment law cases means taking into account the challenges and dilemmas related to both concepts combined, but also with added layers of complexity that emerge from particularities of labour law and world of work. Even though this is by no means an easy task, it is certainly worth the effort.

5. Concluding Remarks

From the very beginning, labour law had the goal to protect the worker as the weaker side in the employment relationship, so the protective character is considered to be a distinctive feature of this branch of law. Development of labour law over time meant modifying not only the scope, but the approach in the matters of protection – from paternalistic measures introduced in order to protect to most vulnerable categories to guarantee of non-discrimination and equality. In that regard, non-discrimination and equality are generally recognized as a key

principle and the pillars that the labour law is built upon. Special attention to this principle is devoted in the EU, where equality is also considered to be a fundamental value of the Union. However, in order to truly be effective and meaningful, each principle must develop over time by recognizing new challenges in practice and issues that should be addressed. In this regard, the existence of discrimination, which occurs in many different forms and based on different personal grounds, is always an issue not only present, but especially emphasized in employment. The said is true globally speaking, but also in the context of the EU. Therefore, it is crucial to recognize new challenges, i.e., forms in which discrimination may occur, but also the “old” challenges that were not addressed earlier. In light of the mentioned, it can be stated that recognizing the need to protect victims of associative discrimination, which is primarily to be attributed to the ECJ, is a great step forward in achieving substantive equality. Namely, it, at least to some point, changes the perception of discrimination in employment and generally, by widening the scope of protection. However, introducing a new concept always poses a number of questions and bears risks, while associative discrimination is no exception in this sense. To a considerable extent, these questions refer to relation between associative discrimination on one hand and direct, and indirect discrimination on the other. While the concept of direct associative discrimination is also subject to discussion, it has certainly sparked less debate in comparison to the concept of indirect associative discrimination. Namely, addressing indirect associative discrimination means taking into account all the challenges related to indirect discrimination, as well as challenges relating to associative discrimination, as well as the added layers of complexity. Due to the mentioned, the possibility for considering associative discrimination as indirect speaks of the revolutionary role of the ECJ in this regard, while the consequences of introducing such consideration can be of great importance precisely when it comes to the world of work.

In conclusion, introducing the concept of associative discrimination as such, and especially in terms of indirect discrimination, despite all the challenges and risks, means climbing at least one step more on the metaphoric ladder towards substantive equality.

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