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**The First Substantive ECJ Judgment on the Racial Equality Directive:
A Strong Message in a Conceptually Flawed and Responsively Weak Bottle**

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The First Substantive ECJ Judgment on the Racial Equality Directive: A Strong Message in a Conceptually Flawed and Responsively Weak Bottle

By Kristin Henrard*

Abstract

The aim of this article is to demonstrate, through close reading of the first judgment containing a substantive reasoning on the Racial Equality Directive, that in several respects the ECJ in its preliminary ruling does not provide the national court with a useful answer, as it does not respond to particular questions and because of an unsound or at least confusing way of reasoning. In this respect, the substantive clarification of the RED is not optimal. At a more procedural level the argument is developed that the ECJ should adopt, especially in preliminary ruling procedures, broad, more systematic and thus elaborate, rather than narrow, condensed rulings.

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Introduction

It has been widely understood and acclaimed that European Union equality law was revolutionized by the incorporation of Article 13 into the EC Treaty. This article put in place a broader equality culture because it added several new anti-discrimination grounds to the Treaty.¹ The Racial Equality Directive (RED) was one of the earliest realizations of the new legislative competence created with Article 13. The purpose of the RED as can be concluded from Article 1 in combination with the Preamble² is the effective protection against racial discrimination. While the RED is explicitly designed to provide this protection also beyond the employment sphere, it is in any event meant to realize and safeguard an inclusive labor market.

The extent to which this important goal can be reached depends also on the interpretation of and the more general reasoning in relation to this instrument by the European Court of Justice (ECJ), as ultimate interpreter. It is in this respect essential that the ECJ adopts sound reasoning with respect to both conceptual and enforcement issues. The first case of the ECJ on the RED containing a substantive reasoning³ was eagerly awaited, not in the least because this Directive

¹ See also H. Meenan, 'Preface', in H. Meenan (ed.), *Equality Law in an Enlarged European Union: Understanding the Article 13 Directives*, CUP 2007, viii.

² See inter alia RED, Preamble, Recitals 12, 16 and 26.

³ In addition to a few judgments relating to proceedings brought by the European Commission, and a bundle of judgments both from the CFI and the ECJ concerning (identical or in any event highly similar) complaints brought by Karola Gluiber, there is C-328/04 *Attila Vajnai* (OJ C-10, 14.01.2006, p. 5) (hereinafter: ECJ, *Vajnai*) and T-11/03 *Afari v European Central Bank* (OJ C-106, 30.04.2004, p. 63) (hereinafter: CFI, *Afari*). However, only the latter – the judgment of the CFI – contains a few substantive clarifications of (particular provisions) of the RED.

As of end of April 2009 there are a few 'narrow' judgments of the ECJ in terms of the RED, which were initiated by the European Commission because of the untimely transposition of the Directive or because of the lack of notification to the Commission of the implementation measures. See C-329/04 *Commission v Federal Republic of Germany* (OJ C 143, 11.06.2005, p.13); C-320/04 *Commission v Luxembourg* (OJ C 93, 16.04.2005, p. 2); C-327/04 *Commission v Republic of Finland* (OJ C 93, 16.04.2005, p. 3); and C-335/04 *Commission v Austria* (OJ C 171, 09.07.2005, p. 5). While in theory the former type of judgments could have led the Court to provide clarifications about the correct interpretation of the RED so as to explain what is required for proper implementation (and thus also what is lacking), this did not happen. The situation of the countries was such that it was clear that they had not completed the transposition process.

The set of complaints brought by Karola Gluiber against the Commission are similar in the sense that the ones before the CFI all fall foul of the steady jurisprudence that an individual is not able to attack a refusal of the Commission to start infringement proceedings against a state: inter alia T 63/05, T 64/05, T 54/05 *Kröppelin v Council* (OJ C 193, 06.08.2005, p. 29), T 78/05, T 79/05. The subsequent complaints before the ECJ concern procedural problems with the CFI and are not relevant here (inter alia C-349/05 *Gluiber v Commission*, C-350/05 *Gluiber v Commission*, C-348/05 *Gluiber v Commission*).

Vajnai concerns a preliminary ruling (in criminal proceedings) of a Hungarian court, but the ECJ does not get into the substance of the complaint as it holds that *Vajnai*'s situation falls outside the scope of community law, and therefore the ECJ does not have jurisdiction to answer the question (paras. 14-15).

In *Afari* the CFI does give a few clarifications about the RED. Without denying the possible overlap of race and language, the CFI justifiably holds that a complaint concerning the fact that *Afari*'s colleagues speak German in

has been qualified as a, if not the, most promising avenue for the development of an internal minority protection policy for the European Union.⁴ When, more than five years after the expiry of the implementation date of the Directive, this first case has finally been decided, the reasoning adopted there invites and merits close scrutiny. As is often the case with regard to discrimination issues, the case came to the ECJ as a request for a preliminary ruling from a national court, in casu the Brussels Labour Court of Appeal in the case of *Centrum voor Gelijkheid van Kansen en Racismebestrijding v Firma Feryn NV*.⁵

The aim of this article is to demonstrate, through close reading of the *Feryn* judgment, that in several respects the ECJ in its preliminary ruling does not provide the national court with a useful answer, as it does not respond to particular questions and because of an unsound or at least confusing way of reasoning. In this respect, the substantive clarification of the RED is not optimal. At a more procedural level the argument is developed that the ECJ should adopt, especially in preliminary ruling procedures, broad, more systematic and thus elaborate, rather than narrow, condensed rulings.⁶

An evaluation of the distinctive nature of preliminary rulings and the ensuing demands for the reasoning of the ECJ (paragraph 1) precedes a succinct description of the relevant facts of the case and the issues pertaining to the interpretation of the RED which the national court was uncertain about, given its questions, are identified (paragraphs 2 and 3). Subsequently, the judgment of the ECJ will be analyzed in depth, touching on some conceptual as well as enforcement related issues. The former concerns the concept direct discrimination and the distinction between an instance of ‘speech’ and ‘practice’ discrimination (paragraph 4). The latter ranges from legal standing implications (paragraph 5), the allocation of the burden of proof and the related review model (paragraph 6), to what would be the appropriate sanctions (paragraph 7). For each of these issues the analysis will include some basic theoretical

her presence while she does not understand that language does not amount to a complaint about racial discrimination (para. 138). In relation to Article 8 and more particularly with respect to what is required for a prima facie case (and the concomitant shift in the burden of proof), two points are made by the CFI: mere allegations do not create a prima facie case (paras. 140-142 and 162) and a prima facie case indeed pertains to the causality between the differential treatment and the ground on which it is based (para. 162). No further clarification about what would have sufficed to make out a prima facie case is given.

⁴ Inter alia B. De Witte, ‘The Constitutional Resources for an EU Minority Protection Policy’, in G.N. Toggenburg, *Minority Protection and the Enlarged European Union: The Way Forward*, OSI 2004, 116.

⁵ C-54-07, *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding (Centre for Equal Opportunities and Combating Racism) v Firma Feryn NV*, 10 July 2008 (hereinafter: ECJ, *Feryn* or AG, *Feryn*).

⁶ See also C.R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court*, Harvard University Press 2001, 219-220, 261.

considerations and assess the relevant rulings of the Court in this respect, while indicating what would have made for sounder and more informative reasoning.

Finally, the preceding arguments for broad, more elaborate rulings will be translated in a call for more ‘system’ reasoning, especially in relation to preliminary rulings.

1. The importance of broad and sufficiently elaborate preliminary rulings

In terms of the division of competences between the ECJ and the national courts as captured in the preliminary rulings procedure, it is crucial that the ECJ provides adequate clarity to the national courts. This educatory role of the Court⁷ is essential to preserve the uniformity of EC law, which is the central goal of the preliminary ruling procedure.⁸ Hence the Court should take care to provide sufficient clarification regarding the issues the national court’s questions reveal (fundamental) uncertainty about.

It is accepted that the ECJ may reformulate⁹ the questions posed by the national court and even alter them to make them pertinent. This can be understood as meaning that the reformulation distills the relevant question in terms of EC law, thus enabling the Court to contribute more effectively to the unified understanding of EC law. In this respect the Court often uses the formula ‘the question actually can be summarized as follows ...’.¹⁰ At the same time it is essential to acknowledge that the ECJ’s prerogative of reformulation finds its limits in the goal of the procedure, to the extent that the reformulation is supposed to be such that the question will lead to an answer that gives the national court the clarity about EC law it seeks and

⁷ See also G. Davies, ‘The division of powers between the European Court of Justice and national courts’, *ConWEB* 2004 (no 3) 24.

⁸ Inter alia A. Arnall, *The European Union and its Court of Justice*, OUP, 2006, 95; P. Craig & G. De Burca, *EU Law: Texts, Cases and Materials*, OUP, 2003 (third edition), 475, 478. See also G. Tridimas & T. Tridimas, ‘National courts and the European Court of Justice: A Public choice analysis of the preliminary ruling procedure’, *International Review of Law and Economics* 2004 (second edition), 125-146.

⁹ Lenaerts et al. expose that the ECJ actually often reformulates questions by national courts, sometimes even to replace or supplement the provisions indicated by the national court in its preliminary ruling by those provisions of community law which the ECJ considers actually relevant. The overall purpose is once again to optimize the efficient collaboration between the ECJ and the national courts, so that the latter can apply EC law correctly to the case at hand, see K. Lenaerts et al., *Procedural law of the European Union*, Sweet and Maxwell 2006, 51.

¹⁰ See also M.-C. Bergerès, ‘La reformulation des questions préjudicielles en interprétation par la Cour de justice des Communautés européennes’, *Receuil Dalloz Sirey* 1985, 157.

needs, in order that it can decide the case before it in a way which respects EC law.¹¹ When proceeding with a preliminary ruling, the ECJ arguably accepts that the answer is ‘necessary’ for the national court to decide its case. This is difficult to reconcile with a ruling on the basis of a strongly reduced set of questions that do not include all the issues that are identified by the national court as problematic.¹²

Sometimes the reformulation is done so as to abstract the questions sufficiently from the facts of the case, because otherwise the ECJ would get too close to actually deciding the individual case.¹³ The essence of the Article 234 procedure is indeed that it signals a distinction between the respective tasks of the ECJ and the national courts: the former is confined to the interpretation of EC law, the latter to applying the law to the case at hand.¹⁴ Nevertheless, it should be acknowledged that there is a very thin line between applying the law on the one hand and on the other giving such a detailed and context specific ruling on the correct interpretation of EC law¹⁵ that the national court cannot do much more than literally apply the ruling of the ECJ to the case.¹⁶

¹¹ Bergerès 1985, 156. See also Lenaerts et al. 2006, 49. In this respect it has even been argued that the Court also reformulates questions by the national courts ‘to increase the usefulness of the answer for the national court’: A. Rosas, ‘The European Court of justice in context: Forms and Patterns of Judicial Dialogue’, *E.J.L.S* 2007/2, 8.

¹² See also Lenaerts et al. 2006, 49. According to Allan Rosas, with the reformulation of the questions the national courts aim ‘to increase the usefulness of the answer for the national court’: A. Rosas 2007/2, 8. As will be argued below, this has not been the issue in the present case.

¹³ As the ECJ put it in the famous *Costa v Enel* judgment (C-6/64): ‘the Court has the power to extract from a question imperfectly formulated by the national court these questions which alone pertain to the interpretation of the Treaty...’. Inter alia Bergerès 1985, 157, 161, who hints at a certain evolution in the ECJ’s position, which is also related to the reality that often incompatibilities between national law and EC law are not patently obvious, and to it also refers to the vagueness of some of the criteria used in either one of these laws.

¹⁴ Inter alia Craig & De Burca 2003, 472.

¹⁵ See also Bergerès 1985, 157 and 161; Lenaerts et al. 2006, 49. See inter alia ECJ, C-30/02, Recheio – Cash & Carry (OJ C 201, 07.08.2004, p. 1), para. 35.

¹⁶ According to Craig and De Burca this would kind of oblige the national court to execute an issue-specific judgment of the ECJ: Craig & De Burca 2003, 473.

It is more difficult to distinguish between the interpretation of EC law and applying the law to the case at hand, when the national law implementing a directive follows the wording of the directive almost word by word – as is often the case in relation to the RED. It should be noted in this respect that in the so-called ‘Dzodzi line of cases’ (including C-28/95 *Leur-Bloem*, [1997] ECR I-1981 (hereinafter: ECJ, *Leur-Bloem*), C-130/95 *Giloy*, and C-306/99 *BIAO* (OJ C 44, 22.02.2003, p. 1), the ECJ has even accepted to interpret national provisions meant to implement EC directives, when the national law extends its application beyond the scope envisaged in the directive concerned. This line of cases is firmly established, notwithstanding severe criticisms by several Advocate Generals. For an excellent overview see K. Lenaerts, ‘The Unity of European Law and the Overload of the ECJ – The System of Preliminary Rulings Revisited’, *The future of the European judicial system in a comparative perspective: 6th International ECLN-Colloquium/IACL Round Table Berlin, 2-4 November 2005*, *Nomos* 2006, 225-228. Arguably, interpreting national law provisions further confirms the non self-evident nature of the distinction between interpretation and application.

In any event, at times the ECJ has been quite willing to respond in such a concrete (and specific) way that it de facto determined the actual case.¹⁷ It has even been said that ‘the ECJ has steadily come to provide more “concrete”, as opposed to “abstract” rulings’.¹⁸ It could be argued that concrete rulings are to some extent acceptable because the interpretation of norms can be clarified by showing how it works in a particular setting.¹⁹

However, an important argument against such concrete rulings is that their reach (applicability) tends to be ‘narrower, thereby diminishing somewhat their precedent value for similar – but not identical – cases’.²⁰ Abstract rulings on the other hand are broad and have more potential to be elaborate – rather than condensed – and can thus provide more clarity about EC norms and the underlying system of interrelated concepts.²¹ However, it should be acknowledged that abstract rulings can also be condensed, in that the answers they provide fail to give the extra guidance the national courts need about the meaning and implications of EC law.²²

Rulings that are both broad and elaborate are to be preferred though, because they remain closer to the original goal of the preliminary rulings procedure.

2. *Feryn*: Setting the scene

The *Feryn* case surely raised an important question, which the ECJ identified and answered in a way which undoubtedly contributes to an effective protection against racial discrimination. The *Feryn* judgment sends the strong message that a statement about the hiring policy in itself (potentially) amounts to direct discrimination. At the same time however, the judgment can be criticized in several respects.

¹⁷ Inter alia C-32/75 *Cristini v SNCF*, para. 19; C-106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA*. Arguably this would concern areas of the law where the Court wants to keep maximum control, see Craig & De Burca 2003, 473. According to Rasmussen these kinds of detailed rulings can actually be found in over two-thirds of the references, Rasmussen, ‘Remedying the crumbling EC judicial system’, *Common Market Law Review* 2000, 1101.

¹⁸ Lenaerts 2006, 217.

¹⁹ See also Bergerès 1985, 161. The ECJ has itself recognized this in several judgments in which it refused to answer questions referred by national courts because they had not provided sufficient information about the factual background of the case (inter alia ECJ, joint Cases C-320/90, C-321/90 and C-322/90 *Telemarsicabruzzo SpA*, [1993] ECR I-393 and AG Jacobs in ECJ, *Leur-Bloem* and AG Ruiz-Jarabo Colomer in C-1/99 *Kofisa Italia*, [2001] ECR I-219). See also Arnull 2006, 116 who highlights that it can even be impossible to interpret a rule in the abstract. If the only thing the ECJ would do is interpret EC law in the abstract, without getting into the application of these rules to the case at hand, why would it need all that factual background? See also G. Davies 2004, 6-7.

²⁰ Lenaerts 2006, 217.

²¹ See *infra*.

²² See also Arnull 2006, 107.

In view of the fact that the *Feryn* case is the first case on this Directive which allows and requires the ECJ to clarify the meaning of its provisions, thus contributing to the uniformity/unity and consistency of EC law,²³ one would have expected the Court to have made use of this opportunity to the fullest extent possible.²⁴ The reality has proven differently.

3. Factual background of *Feryn* and overview of the preliminary questions by the national court

While a Belgian manufacturer of doors, Feryn, is having trouble recruiting fitters, one of the directors made a public statement (to a journalist) that the company would not hire Moroccans because customers would not want them. The Belgian Centre for Equal Opportunities and Combating Racism alerted the company to the problematic nature of this statement. In the following joint press release the company accepted that it would in future not exclude foreigners. However, the negotiations for a diversity plan for the company were ultimately not successful as Feryn refused to cooperate.

The Centre then went to court with an application for injunction for the company to stop its discriminatory recruitment policy. This was turned down by the court of first instance because it found no proof that one or more Moroccans had actually applied and were refused employment. The Centre appealed and the Court of Appeal then requests a preliminary ruling from the ECJ, consisting of six questions, which are reformulated and summarized by the ECJ as follows:

‘The national court has requested the Court to interpret the provisions of Directive 2000/43 for the purpose, *essentially* of assessing the scope of the concept of direct discrimination in the light of the public statements made by an employer in the course of a recruitment procedure (first and second questions), the conditions in which the rule of the reversal of the burden of proof laid down in the directive can be applied (third to fifth

²³ Inter alia Arnall 2006, 95; Craig & De Burca 2003, 475, 478. See also G. Tridimas & T. Tridimas 2004, 125-146.

²⁴ In this respect reference can be made to the cases in which the ECJ gave preliminary rulings with respect to questions which were not relevant to the litigation before the national court, because the clarification given would be helpful to future cases. See G. Behr, ‘The Existence of a Genuine Dispute: An Indispensable Precondition for the Jurisdiction of the Court under Article 177 EEC Treaty?’, *Common Market Law Review*. 1980, 530-532.

questions) and what penalties may be considered appropriate in a case such as that in the main proceedings (question 6)'.²⁵ [emphasis added]

This condensed overview touches on the broad themes singled out by the national court, but it seems questionable whether the ECJ has in this way 'covered' the issues the national court, given its elaborate questions, is uncertain about.

The questions are not entirely put in a logical order because the *second* one seems to be central to the entire case. It concerns the question whether the use of an exclusionary recruitment policy as such (irrespective of actual employment decisions) amounts to direct discrimination. The *first* question, asking whether employers could point to their customer's wishes to justify their directly discriminatory selection criteria, is de facto a kind of follow up question to the second one.²⁶ The *third* question seeks to determine whether the relation between a public statement about selection criteria on the one hand and the actual recruitment practice of only employing indigenous persons on the other, can constitute 'discrimination'. The *fourth* question underscores the profound uncertainty about what is needed to establish a presumption of discrimination (or a prima facie case), and what could be used in rebuttal. Its numerous sub questions are again tangled up with the uncertainty about the possible interaction between past and future actions in relation to public statements about recruitment criteria (in these respects). One of the sub questions enquiring about the relevance of actual practice, exhibits uncertainty about the concept of indirect discrimination and its relation to a public announcement of discriminatory selection criteria. Finally, the national court asks guidance regarding what

²⁵ ECJ, *Feryn*, para. 20. For the complete version of the text, please see the Annex accompanying this article.

²⁶ An interesting point can be made here about the overlap between differentiation on the basis of 'racial and ethnic origin' and differential treatment of immigrants. Recital 13 of the RED explicitly states that 'this prohibition of discrimination should also apply to nationals of third countries'. The words used in the case file clearly show the extent to which the courts, including the ECJ, seem to equate exclusionary language vis à vis Moroccans with exclusionary language vis à vis immigrants in general. Indeed, while the public statement of one of the directors of Feryn mentioned 'Moroccans', both the Belgian Court of Appeal and the ECJ (para. 2) mention 'immigrants' when referring to that same public statement. This only serves to underscore the broader relevance of the case. At the same time, this seems to confirm the particularly vulnerable position of immigrant groups in general, for they are often in dire need of protection against racial discrimination. While in itself this does not explicitly address the legitimacy of the exclusion of differentiations on the basis of nationality or in relation to migration issues as set out in Article 3 RED (and Recital 13), it arguably confirms that differentiations by private parties on the basis of nationality ('Moroccans') or immigrant status are covered by the RED and fall foul of the prohibition of racial discrimination. See G.N. Toggenburg, 'The Race Directive: A New Dimension in the Fight against Ethnic Discrimination in Europe', *European Yearbook on Minority Issues* 2001/2, 238, who furthermore argues that 'a member state which imposes targeted restrictions on non-EU citizens on the basis of nationality may therefore also be interpreted as constituting indirect discrimination on grounds of race or ethnicity'.

amounts to ‘effective, proportionate and dissuasive sanctions’. It wants to know what type of sanction would be effective, proportionate and dissuasive in the light of this particular case.

A comparison between the reformulation by the ECJ and the overview of the questions by the national court reveal that there is no reference at all in the former to the first question concerning the potential relevance of customers’ wishes, which was relied upon by Feryn. Secondly, this reformulation does not reflect the profound uncertainty and unease of the national court about the interaction between various public statements regarding the recruitment policy on the one hand and actual recruitment decisions and employment patterns on the other. Similarly, the reformulation misses to convey the magnitude of this uncertainty as it is reflected in the national court’s consideration of the possibility of indirect discrimination. The following in depth analysis of the judgment will show that the Court’s response mirrors these ‘reductions’.

4. The reach of the concepts of direct versus indirect discrimination

Notwithstanding the national court’s question about the possible relevance of the concept of indirect discrimination,²⁷ the ECJ does not explicitly answer the question about indirect discrimination. Its response to the first and second questions only talks in terms of ‘direct discrimination’ (paragraphs 22-26), which could be considered an implicit response. Nevertheless, answering this question more explicitly would not only have been more useful for the national court, but would also have enabled the Court to clarify the system of EC discrimination law.

The RED is actually the first provision of EC law which contains an explicit definition of the concept ‘direct discrimination’. Originally, the equality provisions prohibited discrimination without specifying or distinguishing different forms of discrimination.²⁸ The ECJ early on developed a more refined conceptualization by identifying ‘indirect discrimination’, to make sure that less blatant and less obvious forms of discrimination would also be covered.²⁹

²⁷ See *infra*, with the call for more system reasoning.

²⁸ G. Davies, *Nationality discrimination and free movement law*, s.n. 2002, 31; S. Fredman, *Discrimination law*, OUP 2002, 95-100 and 109-111.

²⁹ For an extensive overview of this development, see C. Tobler, *Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*, Intersentia, 2005, 101-277. See also E. Ellis, *EU anti-discrimination law*, OUP 2005, 88.

The definitions as found in the RED allow one to identify the essential elements of ‘discrimination’ while revealing the different nature of direct and indirect discrimination. Article 2(2)(a) stipulates that direct discrimination ‘shall be taken to occur where one person is treated less favorably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin’ and Article 2(2)(b) states that ‘indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary’.

When comparing these two definitions, the following common elements of discrimination can be detected: there is a question of (1) a harm, (2) a causal relationship between the harm, (3) a protected ground (in the RED obviously racial or ethnic origin), and (4) a comparison with (otherwise) comparable cases. In several respects these definitions reveal differences between direct and indirect discrimination. At a conceptual level³⁰ this is especially visible in the description of the harm, and the nature of the causal relationship between the harm and the protected ground.³¹ For direct discrimination, the harm consists in less favorable treatment,³² and there is a direct (often explicit) causal link with the protected ground. Consequently, direct racial discrimination captures measures that treat a person less favorably explicitly because of his/her racial or ethnic origin. For indirect discrimination the harm is rather identified at group level, namely anything that ‘would put persons of a racial or ethnic group at a particular disadvantage’, whereas the causal link between the harm and the protected ground is

³⁰ See *infra* for the model of review.

³¹ To be precise, there are actually two kinds of causal relationships that need to be present, not only one between the protected ground and the challenged treatment (the one which is the most well known), but there should also be one between the harm suffered and the challenged treatment (provision, criterion or practice). In this respect an interesting elaboration can be made in relation to direct versus indirect discrimination: while the first causal link is essential in relation to direct discrimination, it is often the second one which plays in cases of indirect discrimination.

³² The implication of differential treatment should be read broadly and as also including instances of identical treatment in relation to substantively different situations. Gerards calls this ‘material distinction’, see J.H. Gerards, *Judicial review in equal treatment cases*, Martinus Nijhoff 2005, 12. At the same time, this broad understanding of the concept distinction confirms the relevance of the ‘comparability’ requirement. A formal distinction concerns a differential treatment of comparable situations, whereas a material distinction refers to identical treatment of non comparable situations.

more indirect. This causal link is established by the actual or potential³³ negative (disadvantageous) and disproportionate impact of a (seemingly) neutral measure on a group of ‘persons of a racial or ethnic origin’.³⁴ Typical for indirect discrimination is thus that it focuses on the effects of a neutral measure on a particular group of persons.

The distinction between direct and indirect discrimination may seem to be clear, but the jurisprudence of the ECJ about gender discrimination actually reveals that this is not the case. The ECJ has indeed adopted an effects based approach to direct discrimination in a line of cases, in which it uses the qualification of direct discrimination in relation to a neutral measure because it exclusively affected members of a protected group (for example pregnant women).³⁵ The apparent shift in the boundary between direct and indirect discrimination is probably related to the fact that the conceptualization of direct and indirect discrimination by the ECJ has happened on a case by case basis, and did not depart from a clear theoretical paradigm. In turn this lack of a clear paradigm could explain the uncertainty of the national court in *casu*.

a. *Feryn*: A strong message

Be that as it may, when one explicitly excludes certain ethnic groups³⁶ from the people one would consider employing,³⁷ this seems to concern a less favorable treatment of persons because they are members of a particular ethnic group, and thus exposes a direct causal link to the protected ground. Consequently, the RED’s definition of direct discrimination appears to be complied with.³⁸

³³ The formulation of Article 2(2)(a) only mentions ‘would put at a particular disadvantage’, but when reading the Explanatory Memorandum of the RED it is obvious that indirect discrimination still encompasses instances of actual disparate impact, which is in line with the preceding jurisprudence of the ECJ.

³⁴ See also M. De Vos, ‘De bouwstenen van het discriminatierecht in de arbeidsverhoudingen na de wet bestrijding discriminatie’, in M. De Vos & E. Brems (eds.), *De Wet Bestrijding Discriminatie in de Praktijk*, Intersentia 2004, 75.

³⁵ Inter alia C-506/06 *Mayr*, para. 29 (OJ C 92 of 12.04.2008, p. 7); C-460/06 *Paqay*, para. 29 (OJ C 297 of 08.12.2007, p. 16); C-191/03 *McKenna*, para. 47 (OJ C 281, 12.11.2005, p. 2); C-284/02 *Dionyssopoulou v Council* (OJ C 193, 06.08.2005, p. 23); C-116/06 *Kiiski*, para. 55 (OJ C 269 of 10.11.2007, p. 12); C-207/98 *Mahlburg*, para. 20; C-394/96 *Brown*, para. 24; C-177/88 *Dekker*, paras. 12-17. See also C-196/02, *Nikoloudi v Organismos Tilepikinonion Ellados AE*, 10 March 2005, paras. 31-35 (OJ C 106, 30.04.2005, p. 1) (hereinafter: ECJ, *Nikoloudi*, paras. 31-35).

³⁶ See supra footnote 28 on the link generally made with the concept ‘immigrants’.

³⁷ Selection criteria are explicitly enumerated among the components of the scope *ratione materiae* of the RED in Article 3(1)(a). See also ECJ, *Feryn*, para. 23.

³⁸ This qualification remains also when one distinguishes between two instances of discrimination: a public announcement about recruitment policy and the actual recruitment practice. See *infra*.

Still, the wording of the RED – more particularly the use of the concept ‘treatment’ – has led to speculations about how far its meaning could be stretched.³⁹ According to the ECJ in *Feryn*, the mere fact that a public statement was made about the discriminatory selection criteria (or more generally a recruitment policy) can be qualified as ‘treatment’ and suffice to constitute an instance of direct discrimination, irrespective of whether there are actual victims of this policy or whether victims actually come forward.⁴⁰

The critical paragraph of the judgment reads as follows:

‘The fact that an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin, something which is clearly likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market, constitutes direct discrimination in respect of recruitment within the meaning of Directive 2000/43. *The existence of such direct discrimination is not dependent on the identification of a complainant who claims to have been the victim.*’⁴¹ (emphasis added)

In view of the importance of an effective protection against (racial) discrimination, this central message of *Feryn* is a welcome one. As the Court correctly points out such public statements often suffice to dissuade people from applying, hence de facto hindering access to jobs,⁴² while there might consequently not even be applicants to refuse on the basis of this discriminatory policy.⁴³ The effect of statements revealing discriminatory recruitment policies will hamper the emergence of a socially inclusive labor market, and thus counter that aim of the Directive.⁴⁴ This would still be the case even if no person from the excluded group were to apply and not be recruited. The formulation of Article 2(2)(a) indeed shows that it suffices that there is a

³⁹ See inter alia T. Makkonen, ‘Main causes, forms and consequences of discrimination’, [action.web.ca/home], 8.

⁴⁰ In this respect the ECJ seems to follow the approach taken by the House of Lords, as it emphasizes that words of acts or discouragement can also be considered as ‘treatment’, see K. Monaghan, *Equality Law*, OUP 2007, 290-291.

⁴¹ ECJ, *Feryn*, para. 25.

⁴² Ibid. See also AG, *Feryn*, para. 16.

⁴³ AG, *Feryn*, para. 16. This statement clearly shows the incongruence of not considering statements about policy and actual practice as two separate instances of discrimination. It is a pity that in paragraph 23 also the AG gets bogged down by a failure to distinguish them.

⁴⁴ See also Preamble, Recital 8 and ECJ, *Feryn*, para. 23.

hypothetical comparator, it states that there is a question of discrimination when ‘one person is treated *less* favorably than another is, has been or *would be treated* in a comparable situation’ (emphases added).

The extent to which such public statements, explicit discriminatory job vacancies and also publicity about services (e.g. rental houses, fitness clubs) de facto withhold the seemingly excluded person from applying for the job, from reacting to the announcements, or from actually enrolling at the fitness club is clearly visible in the practice of national equality bodies like for instance the Dutch Equal Treatment Commission.⁴⁵

The reality that victims of discrimination do not necessarily make a complaint, further buttresses the importance of the possibility to sanction the mere statement of a discriminatory recruitment policy in order to root out discriminatory instances.

b. Conceptual clarity: Two separate instances of discrimination

The questions by the Belgian court also reveal confusion about the relation between actual recruitment decisions and practice on the one hand and a public statement about selection criteria on the other, for the end-assessment of whether or not discrimination has occurred.

The ECJ could have enhanced the conceptual clarity for the national court(s) by being consistent in its qualification of a public statement as an instance of discrimination in itself by distinguishing between two separate instances of (possible) discrimination. When one is serious about qualifying a public statement about recruitment policy (selection criteria) as a (possible) instance of discrimination, because of its strong dissuasive force, one should keep that separate from assessments of actual recruitment practice. Arguably, even if one would hire one or two

⁴⁵ In several of its opinions the Dutch Equal Treatment Commission addresses complaints by foundations and institutions about particular advertisements, vacancies of employers or service providers, without there being an identifiable victim: Opinion 2007-100 about a special school and its policy not to hire people who effectively have homosexual relationships; Opinion 2006-11 regarding an advertisement by a real estate agency hiring houses to foreign employees on temporary contracts in The Netherlands. In the latter Opinion, the Commission explicitly highlighted that this public advertisement will entail that Dutch people will not react to the offer and hence will de facto exclude them on the basis of their race/nationality (para. 4.10). Similarly in complaints brought by individuals (e.g. Opinion 2006-11), the Commission highlights the importance of not actively doing anything which would lead to the exclusion of particular groups, *inter alia* because they would not feel welcome to join the fitness club (as they were advised not to come in with a headscarf because that would elicit negative reactions from the other customers: Opinion 2006-48). In Opinion 2007/166 the Commission accepted that although the complainant, a man, had not actually applied for the position because the vacancy explicitly stipulated a requirement that the position be filled by a woman, he clearly had sufficient interest in the outcome of the complaint as he was looking for work and was otherwise suitable for the position (para. 3.3).

persons that do belong to the ethnic or racial group one was not going to employ, that does not take away the dissuasive force of the public statement which is still out there.

Hence, two different possible instances of discrimination should be distinguished: one in relation to the statement as such (the ‘speech’ instance), and one in relation to the actual recruitment actions (the ‘practice’ instance). This line of reasoning would not only be more sound, it would also be more conducive to an effective protection against racial discrimination because only in this way a speech instance of discrimination is truly recognized.

As is revealed by the (quasi) jurisprudence of some national equality bodies, like the Dutch Equal Treatment Commission, it makes for clear reasoning and more convincing arguments to distinguish public statements and actual practice as two different (possible) instances of discrimination. In the complaints raised before the Dutch Commission it consistently addresses problems relating to possible vacancies or advertisements as being distinct from problems in the actual practice of hiring, of providing services to persons etc. This entails that in some opinions the Commission establishes a prohibited instance of discrimination both in relation to the advertisement or public statement and in relation to the subsequent (hiring) practice;⁴⁶ while in others it explicitly confines its negative assessment in terms of the advertisement because the actual practice would not be discriminatory or because the complaint is only targeted at the public announcement.⁴⁷ In this way the equality body arguably exhibits a consistent, conceptually pure format of reasoning which enhances its intelligibility and its legitimacy.⁴⁸

The ECJ could have clarified the fundamental distinction between direct and indirect discrimination in EC law by tying the facts of the case more explicitly to the definitions of the

⁴⁶ Inter alia Dutch Equal Treatment Commission, Opinion 2008-40 concerning a knowledge institute which had advertised a function of project leader for which they had explicitly stipulated the envisaged candidate to be male and of an immigrant background, which had subsequently led to a concomitant recruitment decision (para. 3.3). See also in relation to the provision of services, Dutch Equal Treatment Commission, Opinion 2005-80, para. 5.4, which states that the prohibition of discrimination can be relied upon by potential clients that feel that they are unjustly excluded or disadvantaged by the rules of the provider, hence also when no agreement has been concluded or an actual application has been filed.

⁴⁷ See inter alia Dutch Equal Treatment Commission, Opinion 2006-21 concerning a vacancy with an age maximum without any justification; Dutch Equal Treatment Commission, Opinion 2006-11 concerning the ad which exclusively addressed foreigners while in actual practice nationals could also obtain rental houses (para. 4.10 versus para. 4.11).

⁴⁸ Note that different types of legitimacy can be distinguished. The edited volume entitled the Legitimacy of Highest Court’s Rulings: Judicial Deliberations and Beyond (TMC Asser Press, 2009) distinguishes between legitimacy as a legal, a political, a sociological and a moral concept, see 14-18. Legitimacy in this context would be a combination of legitimacy as both a legal and a sociological concept.

RED as analyzed above. A public statement which stipulates explicitly that one does not want to employ people from a particular ethnic origin (and thus because of this ethnic origin), establishes a direct causal link with the protected ground and it thus concerns direct racial discrimination. Hence, there would be no need to adopt the group perspective and attempt to establish a disproportionate impact on the ethnic group concerned, which is typical for indirect discrimination. The actual practice as separate instance of discrimination could concern several but also just one single appointment decision in which this discriminatory selection policy was used de facto.

Concerning the ‘actual practice’ instance of discrimination, it should be noted that both the national courts and the ECJ proceed from the assumption that there were no actual recruitment decisions based on racially discriminatory selection criteria. However, the study of the case file of the Belgian Court of Appeal⁴⁹ contains references to the interview with the director in which he had actually stated that they needed heavy publicity because so far the only persons that had applied were Moroccans, who they could not recruit because the customers would not want them. In other words, there seems to have been actual rejections on the basis of ethnic origin and thus discriminatory actions in addition to the mere statements that were made. It is rather peculiar that this has not been picked up either by the national courts, nor by the ECJ. This omission might result from the apparent absence of individual victims having come forward, which complicates questions of proof and would have necessitated the Court to engage in a more complete argumentation on what in such circumstances would amount to proof that the actual recruitment practice had not been tainted by racially discriminatory motives. This is not straight forward as is more fully argued below.

5. Enforcement related issue no 1: Legal standing. Conceptual-enforcement mismatch?

A first remark about the ECJ’s reasoning pertaining to enforcement related matters, concerns statements by the Court that are not so much triggered by the questions of the national court but rather by the discussion, which took place at the public hearing, regarding the connection

⁴⁹ A.R.Nr. Kort Geding 292, Arbeidshof te Brussel, *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v N.V. Firma Feryn*, 24 January 2007, 3rd page.

between the concept of direct discrimination on the one hand and the scope (and conditions) of legal standing on the other. Other States (the UK and Ireland) had argued in their intervention that accepting that a mere statement, irrespective of actual victims, could amount to discrimination would not be in line with the RED's absence of obligation on states to accept *actio popularis* (see Article 7). This would imply that the Directive would not require Member States to ensure that public interest bodies are recognized as having *locus standi* to bring judicial proceedings in the absence of a complainant who claims to have been the victim of discrimination.

The Court had to concede the truth of the latter point. However, it goes on to construct an argument in which it 'protects' its teleological reasoning concerning the concept of direct discrimination by extending it to the enforcement sphere. In the process the Court takes the opportunity to emphasize the importance of a move away from the focus on an individualized enforcement, in order to realize the goal of the Directive with regard to a socially inclusive labor market. This would not be possible if it would have to rely on (enforcement attempts by) individual victims only,⁵⁰ especially in instances where there are no actual victims (or at least no victims that come forward).

The importance of this acknowledgement by the ECJ should not be underestimated. Nevertheless, the truth is that Article 7 confines the obligations of the Member States to ensure that judicial or administrative procedures for the enforcement of the obligations under the Directive are available for instances with actual victims (all persons who consider themselves wronged because the principle of equal treatment failed to apply to them). As regards 'associations, organizations or other legal entities, which have... a legitimate interest in ensuring that the provisions of this Directive are complied with' the requirement of an actual victim cannot be missed since the states' obligation is confined to enable these organizations 'to engage either on behalf or in support of the complainant with his or her approval' (paragraph 2).

Arguably, there seems to be an inconsistency within the RED. It is indeed rather curious and de facto untenable that certain types of discrimination covered and prohibited by the RED would not be supplemented by obligating all Member States to establish systems of enforcement

⁵⁰ ECJ, *Feryn*, para. 24.

to counter that category of discrimination.⁵¹ This undoubtedly threatens to undermine the coherence of the RED.⁵²

The ECJ tries to overcome this inconsistency in the RED by relying on the possibility of Member States envisaged by article 6 RED to go beyond the minimum requirements contained in the RED.⁵³ This would imply that while the RED does not oblige, it would allow Member States to provide for the right of associations with a legitimate interest in ensuring compliance with that Directive to bring enforcement proceedings without acting in the name of a specific complainant or in the absence of an identifiable complainant. That is exactly what Belgium has done: they allow associations with a legitimate interest, like the Centrum voor Gelijkheid van Kansen en voor Racismebestrijding, to bring proceedings to enforce the prohibition of discrimination on the basis of racial or ethnic origin, also without acting in the name of a specific complainant.

While it is commendable that the Court safeguards its teleological reading of the reach of the concept of direct discrimination, it would certainly have been better if the Court would have acknowledged the flaws in the formulation of Article 7, which entails an internal inconsistency in the RED.⁵⁴

6. Enforcement related issue no. 2: The model of review and the underlying allocation of the burden of proof

Several of the questions of the national court pertain to a second enforcement related issue, namely the allocation of the burden of proof and the model of review which is based thereupon.

⁵¹ Contra AG, *Feryn*, para. 14, who puts forward that a distinction should be made between the range of discriminatory behavior and the range of enforcement mechanisms.

⁵² ECJ, *Feryn*, para. 38. K. Sawyer, 'The Interpretation of EC Anti-Discrimination Directives 2000/43EC and 2000/78 by the ECJ', presentation at the training seminar of the Academy of European Law (September 2008), paras. 22-23.

⁵³ ECJ, *Feryn*, paras. 26-27.

⁵⁴ It can be argued that in case of severe internal inconsistencies, the Directive would fall foul of one of the general principles of EC law, namely legal certainty, and more particularly its more specific expression in the form of legitimate expectations. Arguably the effect of Community law would not be clear and predictable in case of severe internal inconsistencies, see T. Tridimas, *The General Principles of EC Law*, OUP 1999, 163-167. For more information on the possibility of rulings on the validity of EC legislation through the preliminary rulings procedure, its constraints and drawbacks, see inter alia Arnulf 2006, 107, 125-131; Craig & De Burca 2003, 528-533.

It is to be hoped that this flaw in the article on 'defence of rights' has been picked up by the drafters of the new Directive, broadening the scope *ratione materiae* of the prohibition of discrimination on the basis of the other Article 13 grounds.

In line with the Preamble,⁵⁵ the wording of Article 8 RED establishes a special allocation of the burden of proof⁵⁶ resulting in a particular model of review, as is also confirmed by the Commission in the Explanatory Memorandum.⁵⁷ This special allocation of the burden of proof has been advocated⁵⁸ considering the extensive difficulties to prove discrimination,⁵⁹ especially in instances of uneven power relations as in the case of employment.⁶⁰

Contrary to the general allocation of the burden of proof,⁶¹ in the first phase the claimant only needs to make out a prima facie case of discrimination or in the words of Article 8, 1 RED ‘facts from which it may be presumed that there has been direct or indirect discrimination’.⁶²

⁵⁵ RED, Recital 21, ‘The rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought.’

⁵⁶ Articles 8(2) and 8(4) RED provide two types of cases where this special allocation would not apply: criminal procedures and proceedings in which it is for the court or competent body to investigate the facts of the case.

⁵⁷ See also the Explanatory Memorandum of the Race Directive, COM(1999) 566 which reads: ‘Normally, the legal burden of proving a case rests on the plaintiff. However, obtaining evidence in discrimination cases, where the relevant information is often in the hands of the defendant, can be very problematic. The Commission therefore proposes to shift the burden of proof to the defendant in certain circumstances, as has already been done in the case of sex discrimination.’

⁵⁸ Inter alia, C. Bosse, ‘*Bewijslastverdeling in het Nederlands en Belgisch arbeidsrecht*’, Kluwer 2003, 133-134; Luxton 1999, 358; W.D.H. Asser, ‘*Rechtspraakoverzicht. Bewijslastverdeling*’, Kluwer 1998, 47. See also inter alia ECJ, *Nikoloudi*, para. 68; C-460/06 *Paqua* (OJ C 297 of 08.12.2007, p. 16), para. 37 (hereinafter: ECJ, *Paqua*, para. 37). C-17/05 *Cadman* (OJ C 294 of 02.12.2006, p. 10), para. 31.

It is often argued that the evidence of discrimination is often in the hands of the respondents, see Ellis 2005, p. 98. See also Palmer, who argued that ‘[a]pplication of [the general] rule in discrimination cases under civil or employment law would mean that it would be for the claimant to prove discrimination on the balance of probabilities. Failure to so prove would mean that the claimant’s case would fail.’ F. Palmer, ‘Re-dressing the Balance of Power in Discrimination Cases: The Shift in the Burden of Proof’, *European Anti-Discrimination Law Review* 2006-4, 24.

⁵⁹ Inter alia written comments of Interights in Nachova no. 43577/98 and 43579/98, K. Kitching (ed.) *Non-Discrimination in International Law. A Handbook for Practitioners*, Interights 2005, 122.

See also for the prohibition of gender discrimination, Recital 17, Directive 97/80; and more generally R. Belton, ‘Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice’, *Vanderbilt Law Review* 1981, 1205. See also U. Erdal, ‘Burden and Standard of Proof in Proceedings under the European Convention’, *E.L. Rev.* 2001, 26 SUPP (HUMAN RIGHTS), 4.

⁶⁰ Palmer 2006, 24. See also Monaghan 2007, 563-564, 571; Ellis 2005, 98 and 110; J. Luxton, ‘Equality and Sex Discrimination in the European Union – Is Shifting the Burden of Proof the Answer?’, *Dickinson Journal of International Law* 1999, 358; M.A.J. Leenders, *Bewijsrecht en discriminatie bij de arbeid*, W.E.J. Tjeenk Willink 1997, 7-8. The ECJ has highlighted this in several of its judgments, e.g. C-127/92 *Enderby*, para. 13. And similarly in C-177/88 *Dekker*, where it states that ‘[t]hey would be deprived of any effective means of enforcing the principle of equal pay before the national courts if the effect of adducing such evidence was not to impose upon the employer the burden of proving that his practice in the matter of wages is not in fact discriminatory.’

⁶¹ Palmer 2006, 24; Bosse 2003, 16; J. Kokott, *The Burden of Proof in Comparative and International Human Rights Law. Civil and Common Law Approaches with Special Reference to the American and German Legal Systems*, KLI 1998, 11.

⁶² See also Kokott 1998, 9; Bosse 2003, 15.

Subsequently the respondent needs to rebut this presumption⁶³ by ‘prov[ing] that there has been no breach of the principle of equal treatment’.⁶⁴

Generally, there is not yet a clear understanding of what would amount to a **presumption of discrimination**. While it must be something less than ‘full proof’, a mere allegation about an instance of unequal treatment could not suffice, as it would be unreasonable to require the defendant to come forward with proof to rebut a mere allegation. Indeed certain facts need to be established on the basis of which certain inferences are drawn, thereby raising a presumption.⁶⁵ Nevertheless, it has also been pointed out that the demands for a prima facie case can be rather low, as in most instances it should not be too hard to rebut allegations with no obvious merit.⁶⁶

While what the appropriate standard of proof is for a prima facie case of discrimination may be debatable, there should be some relation to the essential elements of the concept ‘discrimination’ as explained above. In a case about direct discrimination (as in casu) the claimant should prove some primary facts of sufficient significance about a differential (less

⁶³ It would not be correct to speak about a reversal or shift of the burden of proof. This can be better explained when one makes a distinction between the burden of production and the burden of persuasion. While the burden of production moves back and forth between the parties, the burden of persuasion remains on the same party throughout the procedure once it is established. What happens in the special allocation of the burden of proof is that the burden of persuasion is only created once the claimant has made out a presumption of discrimination, and is then imposed on the defendant, see Palmer 2006, 24. See also Kokott 1998, 2.

⁶⁴ Monaghan 2007, 160; I.P. Asscher-Vonk, ‘Towards one concept of objective justification’, in T. Loenen & P.R. Rodrigues (eds.), *Non-discrimination law: Comparative perspectives*, KLI 1999, 39.

⁶⁵ The language of Article 8 RED refers to ‘facts from which it may be presumed...’, this means that there may be several conclusions which may be appropriately drawn to explain the set of facts established. At the level of a prima facie case of discrimination it is sufficient that the presumption is within the range of inferences which can reasonably be drawn from these facts, without it necessarily being the most likely explanation which can be drawn from the facts as established. See also K. Duffy, ‘Anti-discrimination Law: Shifting the Burden of Proof and Objective Justification’, paper presented at ERA Seminar: The EC Anti-Discrimination Directives 2000/43 and 2000/78 (Trier September 2008) 5-6.

The ECHR has a long line of jurisprudence in which it accepts that the required proof may follow from the coexistence of sufficiently strong, clear and concordant inferences: e.g. *Ireland* case para. 161. For the most commonly referred to statement of this principle in the UK, see the speech of Neil LJ in *King v Great Britain China Centre*, [1992] 1 ICR 529.

⁶⁶ See also Gerards 2005, 73. Note that Gerards evaluates a variety of different tests that should entail that there is a just distribution of burden of proof between claimant and respondent, hence it is about determining when there is a prima facie case, entailing the shift in the burden of proof. She concludes that the disadvantage test would be the most appropriate, in the sense that the claimant has to show that a measure or treatment has actually disadvantaged him compared to another person or group (Gerards 2005, 77). However this requirement seems less appropriate in cases like the one at hand where there is no actual victim who comes forward. In the end everything depends on the interpretation of ‘disadvantage’ (and of the victim requirement, see *infra*). To the extent that also immaterial disadvantage is taken on board, statements as the one at hand in *Feryn* can be seen to reinforce prejudice or stigmatize the group concerned.

favorable) treatment, on the basis of which inferences about a causal relation to a particular ground of differentiation can be drawn,⁶⁷ thus raising a presumption of discrimination.⁶⁸

In terms of the general equality theory the respondent has two possibilities to **rebut the presumption**.⁶⁹ the respondent can do this by negating the alleged discrimination, and when this is not possible or not successful, by putting forward a ‘reasonable and objective justification’.⁷⁰ Negation would consist of proving that there is no causal link between the less favorable treatment and the protected ground.⁷¹ Putting forward an objective justification assumes and acknowledges that there is a differential treatment on the basis of a protected ground, but demonstrates a legitimate aim pursued by this differentiation which is furthermore proportionate

⁶⁷ Tobler 2005, 43; Hugh Collins, ‘Discrimination, Equality and Social Inclusion’, *Modern Law Review* 2003, 32; Fredman 2002, 96-100.

⁶⁸ See also (Dutch) Equal Treatment Commission, Opinion 2004/91, paras. 5.4-5.9; Irish Labour Court, *Southern Health Board v Mitchell*, 2001 ELR 201.

While the claimant may make use of comparison as a means of evidence, he does not need to make an argument about the comparability of his situation with the situation of the ‘other’: neither party should actually come up with comparability as an argument. This is related to the fact that comparability (or lack thereof) is not an argument in itself but rather a conclusion or reason of another assessment, the causality question often being the key. Both parties can make use though of comparison as means of evidence. Sufficient or relevant comparability is actually something that needs to be established by the fact finder, Gerards 2005, 78. See also G. Barrett, ‘The Concept and Principle of Equality in European Community Law – Pouring New Wine into Old Bottles?’, 114; Tobler 2005, 73. For further elaboration on this, see the excellent doctoral thesis of Monika Ambrus (Erasmus University Rotterdam 2010).

It would be wise of the applicant to present the proof of the facts in such a way that it seems to concern comparable situations so that the presumption of discrimination will be more convincing for the fact finder.

⁶⁹ This distinction is not often acknowledged in the case law, but a striking example is C-381/99 Brunnhofer, paras. 61-62.

See also Craig, *Systemic Discrimination in Employment and the Promotion of Ethnic Equality*, Martinus Nijhoff 2007, 33-36; D. De Prins, S. Sottiaux & J. Vrieling, *Handboek Discriminatie recht*, 2005, 115-116; P. Garrone, ‘La discrimination indirecte en droit communautaire: vers une théorie générale’, *Revue trimestrielle de droit européen* 1994, 448; Y. Thierry, ‘Gelijkheid, dienstverlening en verzekering: een herontdekkingstocht’, *TBH* 2007/8, 758-759 (who uses different terms, like rebuttal or denial or refutation but the actual meaning of these concepts is the same as the term negation as it is used here).

⁷⁰ P.R. Rodriguez & M. Davidovic, ‘Roma maken school in Straatsburg’, *NJCM Bulletin* 2009, 155-172.

⁷¹ See above. Disproving the causal link between the differential treatment and the ground is mostly relevant in relation to direct discrimination. For indirect discrimination, it is mostly the causality between the challenged treatment and the harm that can be challenged (negated). It is possible for statistics showing a disparate impact to be negated by other statistics showing that there is actually no difference between the two groups of persons, but this is rather rare. A good example in the jurisprudence of the ECJ would seem to be C-167/97 *Seymour Smith*, para. 59.

It should be noted that the ECJ’s formulation in relation to the justification of indirect discrimination in several judgments hints at justification in the sense of negation of causality when it uses the formula ‘justified by objective factors unrelated to any discrimination on grounds of ...’: see inter alia C-303/06 *Coleman* (OJ C 237 of 30.09.2006, p. 6), para. 55; C-4/02 and C-5/02 *Schönheit* (OJ C 304, 13.12.2003, p. 6), para. 71; C-187/00 *Kutz-Bauer* (OJ C 112, 10.05.2003, p. 2), para. 50; C-229/89 *Commission v. Belgium*, para. 13; C-184/99 *Grzelczyk*, para. 12; C-360/90 *Bötel*, para. 18; C-30/85 *Teuling*, para. 13; C-33/89 *Kowalska*, para. 13; C-102/88 *Ruzius-Wilbrink*, para. 15 (hereinafter: ECJ, *Ritzius*, para. 15); C-171/88 *Rinner-Kühn*, para. 12. According to Tobler this would still be proper justification as compelling reasons are provided that are considered to be more important than avoiding disparate impact (Tobler 2005, 258).

to that legitimate aim.⁷² In the system of EC equality law however, it should be emphasized that – with the exception of the general principle of equal treatment – the open-ended justification possibility (as formulated above) is only valid for indirect discrimination, whereas for instances of direct discrimination, one needs to be able to rely on explicit exceptions provided in EC law. Nevertheless, within the ‘exception’ reasoning adopted by the ECJ⁷³ the proportionality principle still plays a fundamental role.⁷⁴ In this respect one could still qualify it as ‘justification’ with this specificity that while the legitimate aims are open ended for indirect discrimination they are exhaustively enumerated for direct discrimination.

c. The model of review and two instances of discrimination: A closer look at the Court’s confusing reasoning

Various questions of the national court in casu reveal that it faces substantial uncertainty about what suffices for a presumption of discrimination, and how this can be rebutted.⁷⁵ The formulation of the questions shows that the national court is confused about how to integrate in its reasoning on the allocation of the burden of proof statements concerning current and future recruitment policy and their interrelation with actual recruitment decisions and their overall result. In other words, the conceptual uncertainty analyzed above extends into the enforcement related question pertaining to the allocation of the burden of proof. It is furthermore striking that the national court asks, about the same issues, whether they amount to ‘discrimination’ and to ‘a

⁷² Inter alia D. Schiek, L. Waddington & M. Bell, *Cases, Materials and Text on National, Supranational and International Non-discrimination Law*, Hart 2007, 270.

⁷³ Compare in this respect the definitions of direct and indirect discrimination as stated in Article 2 RED. Even though it has been noticed that the terminology used by the ECJ is not always equally consistent and coherent (C. Tobler. ‘Rechtvaardiging van direct onderscheid in het EG recht’, *Nemesis* 2001, 124), a review of the case law pertaining to the prohibition of discrimination by the ECJ has demonstrated that the Court generally avoids ‘justification’ language in relation to direct discrimination, but uses other words like ‘exception’ (inter alia C-207/04 *Vergani* (OJ C 217, 03.09.2005, p. 20), para. 34; C-273/97 *Sirdar*, paras. 16 and 26 (hereinafter: ECJ, *Sirdar*, paras. 16, 26); C-177/94 *Richardson*, para. 18 (hereinafter: ECJ, *Richardson*, para. 18) or ‘derogation’ (inter alia C-203/3 *Commission v Austria* (OJ C 82, 02.04.2005, p. 4), para. 42; C-154/96 *Wolfs*, para. 24; C-196/98 *Hepple*, para. 23; C-207/04 *Vergani* (OJ C 217, 03.09.2005, p. 20), para. 31; C-285/98 *Kreil*, para. 23) or both (e.g. C-382/98 *Taylor*, paras. 28 and 35).

⁷⁴ See inter alia C-285/98 *Kreil*, para. 23; ECJ, *Sirdar*, para. 26; C-318/86 *Commission v. France*, para. 28 (hereinafter: ECJ, *Commission v France*); C-222/84 *Johnston*, para. 38. Arguably direct differentiation would not amount to prohibited direct discrimination when it pursues one of the exhaustively enumerated ‘legitimate aims’ (the exceptions provided) and is also proportionate to that aim.

⁷⁵ For some theoretical considerations on the allocation of the burden of proof in relation to discrimination complaints see inter alia N. Cunningham, ‘Commentary: Discrimination Through the Looking-glass: Judicial Guidelines on the Burden of Proof’, *Industrial Law Journal* 2006, 283-284.

presumption of discrimination’,⁷⁶ indicating its profound unease and uncertainty with regard to the (inter)relation of these two concepts. Arguably this should have made the ECJ aware of the need to adopt a clear, meticulous and sound reasoning.

Unfortunately, the ECJ did everything but dispel the uncertainties and rather enhanced the confusion by qualifying the public statement (revealing a discriminatory recruitment policy), both as a presumption of discrimination and as a prohibited instance of discrimination, without further explanation, that is to say without explicitly applying the model of review and explaining the respective qualifications in that context. In paragraph 28 the ECJ explicitly states that ‘the fact that an employer states publicly that it will not recruit employees of a certain racial or ethnic origin *constitutes* direct discrimination in respect of recruitment within the meaning of Article 2(2)(a) of Directive 2000/43’ (emphasis added). However, the subsequent paragraphs concerning the (allocation of the) burden of proof seriously confuse the situation as the Court states in paragraph 31 that the statements concerned ‘*may* constitute facts of such a nature as to give rise to a *presumption* of a discriminatory recruitment policy’ (emphases added).

Hence, what in a few paragraphs earlier is said to *constitute* direct discrimination is possibly merely a presumption of discrimination. This may be an oversight but still makes for bad (not meticulous enough) reasoning.

Considering that the Advocate General is supposed to provide more theoretical considerations and more elaborate reasoning,⁷⁷ one might expect to find an explanation for this double qualification in his Opinion. However, in the Opinion of Advocate General Maduro similar (arguably even more confusing) reasoning can be detected. On the one hand, the public statement by an employer made in the context of a recruitment drive to the effect that applications from persons of a certain ethnic origin will be turned down is said to constitute direct discrimination within the meaning of Article 2(2)(a) of the Directive.⁷⁸ On the other hand, the statement would merely amount to a presumption of discrimination *provided* that two further conditions are met related to the actual recruitment practice (and its results), namely that ‘the actual recruitment practice applied by the employer remains opaque and no persons with the

⁷⁶ In this respect it is useful to compare questions 1, 2, and 3 with 4.1, 4.2 and 4.5.

⁷⁷ M. Lasser, *Judicial Deliberation: Comparative Analysis of Judicial Transparency and Legitimacy*, OUP 2004, 174. Lasser talks about the bifurcation of the judicial deliberations at ECJ level.

⁷⁸ AG, *Feryn*, para. 19.

ethnic background in question have been recruited'.⁷⁹ Again no attempt is made to clarify this double qualification in terms of the model of review.

The AG's Opinion manifests the further problem that practice related requirements are used for the determination of the level of a presumption of discrimination where the alleged discrimination concerns a public statement revealing a discriminatory recruitment policy (a speech instance of discrimination).

The failure of both the ECJ and the AG to distinguish properly between the 'speech' and the 'practice' instance of discrimination leads to different but equally inappropriate inclusions of a 'practice' component in the model of review of the 'speech' instance of discrimination. The one possibility identified by the Court to rebut the presumption concerns an aspect of actual practice (showing that the actual practice is not racially discriminatory),⁸⁰ while the AG had included a related aspect of actual practice (no person of the ethnic background in question being recruited)⁸¹ as one element to determine whether a prima facie case was made out in the first place.⁸²

When considering what would rebut the presumption of direct discrimination, the AG's Opinion fails to give any substantive clarification as to the possible rebuttal of the presumption of discrimination and merely states that the national court should apply the relevant national procedural rules in so far as these respect the principles of equivalence and effectiveness.⁸³ The ECJ confines itself to giving one possibility when it opines that the employer has 'to adduce evidence that it has not breached the principle of equal treatment which it can do *inter alia* by showing that the actual recruitment practice of the undertaking does not correspond to those statements' (emphasis added).⁸⁴ The Court seemingly does consider that there are also other possibilities to rebut this presumption but fails to give any further guidance to the national court on what this could consist of. In the end it remains unclear whether the national court can decide

⁷⁹ AG, *Feryn*, para. 23.

⁸⁰ ECJ, *Feryn*, paras. 31 and 34.

⁸¹ *Ibid.*

⁸² The differences between the two references to actual practice is that the one postulated by the AG is easy to prove as it would suffice that one person with ethnic background has been recruited (AG, *Feryn*, para. 23), while it is more obscure in relation to the statement by the Court.

⁸³ AG, *Feryn*, para. 24.

⁸⁴ ECJ, *Feryn*, para. 32.

for itself what would amount to an adequate rebuttal or whether there are particular criteria that need to be complied with.⁸⁵

When being consistent about the possibility of speech amounting to an instance of discrimination, the Court's reasoning in terms of the rebuttal is simply incorrect in that it does not fit the model of review which flows from the allocation of the burden of proof.⁸⁶

The preceding argument about the need to distinguish consistently between **two instances of possible discrimination** in order to have a conceptually sound argumentation would imply that a separate allocation of the burden of proof should be made for the 'speech' and the 'practice' instance of discrimination.

In relation to the public statement (explicitly excluding certain ethnic groups from the people one would consider employing) as such, it was already argued that this in itself constitutes ample proof of direct (racial) discrimination. If one would try to fit it in the special allocation of the burden of proof, one could say that this public statement makes for a strong prima facie case. When considering what would rebut the presumption of direct discrimination of the speech instance of discrimination, the public statement precludes a negation of the causal link, since the causal link was made explicitly and in public by the director of the firm itself. Consequently, one should check the 'system' inherent in the RED for possible exceptions.⁸⁷ The protection provided by the RED against direct racial discrimination is very strong, inter alia because there are only very limited exceptions which would allow direct differentiations on the basis of racial or ethnic origin. Furthermore, neither Article 4 (genuine and determining occupational requirements) nor Article 5 (positive action) are applicable in the case concerned. Hence, the conclusion needs to be that one is faced with prohibited direct racial discrimination.

After all it is correct that the public statement can be qualified as raising a presumption of discrimination, and, because it cannot be rebutted, in the end it also constitutes an instance of prohibited direct racial discrimination. However, a proper understanding of the model of review envisaged under the RED would require an explicit argumentation in terms of the distinctive steps of the model.

⁸⁵ ECJ, *Feryn*, paras. 33, 34.

⁸⁶ Compare this with the analysis given supra. Arguably this flaw in the Court's reasoning is to a great extent determined by the failure to distinguish neatly between the 'speech' and 'practice' instance of discrimination.

⁸⁷ See also infra: the call on the ECJ for more system reasoning.

What should have been the reasoning in relation to the second possible instance of discrimination, pertaining to actual recruitment decisions and practice? Assuming, as the national courts and the ECJ, that no member of the excluded group actually applied and got turned down (because of his racial or ethnic origin), does this mean that there would be nothing to say about this second potential instance of discrimination? Even if it is important to distinguish between public statements about recruitment policy ('speech') and actual recruitment decisions ('practice'), it would be simplistic to claim that there are no 'interactions' whatsoever between them.

The public statement in casu could also be seen to amount to a presumption of (direct racial) discrimination in relation to the 'practice' instance of discrimination. This presumption arguably could be rebutted by 'proof that the actual practice is not racially discriminatory'. However, it is not self evident what is required to prove that one's actual recruitment practice does not use discriminatory selection criteria. Proving that one person of an ethnic background has been employed would arguably not be sufficient, since this does not necessarily mean that in other instances or even in the great majority of instances racially discriminatory motives did not play a role. This also means that it would be inappropriate (incorrect) to come up with a particular percentage of the personnel that should be of ethnic background in order to rebut the presumption of the 'practice' instance of discrimination. At the same time, it seems unreasonable to demand a review of all recruitment decisions ever taken.

Conversely, it should be considered how to assess a public statement that discriminatory selection criteria will no longer be used. It can be argued that a consistent approach to 'speech' instances of discrimination, in view of their dissuasive force, would imply that such a public statement should be accepted as a cessation (from that moment onwards) of the 'public statement' instance of discrimination. This should be so at least in certain circumstances, more particularly where the context in which the public statement was made gives it credibility and thus balances out the dissuasive force emanating from the original public statement. In casu, the fact that the renouncement was done together with the Belgian Equality Body, which is bound to supervise and follow this up, seems to create such a context.

Without denying the importance of further investigating possible cross-overs, it remains essential to distinguish clearly between statements about recruitment policy and actual practice as two separate instances of (potential) discrimination.

Arguably, if the ECJ would have done so, its judgment would not only have been conceptually sounder but would also have de facto replied to more of the questions posed by the national court. In other words, if the Court would have consistently and fully distinguished between the ‘speech’ and the ‘practice’ instance of discrimination, it would have had to be more elaborate in its reasoning, providing more guidelines about what is required at the level of a presumption and in what ways such a presumption can be rebutted.

7. Enforcement related issue no 3: ‘Effective, proportionate and dissuasive’ sanctions

It was already hinted above that the national court also seems to need guidance about a third enforcement related issue, namely what amounts to ‘effective proportionate and dissuasive sanctions’.

An analysis of the case law regarding gender discrimination shows that the ECJ has not provided many concrete guidelines in this respect⁸⁸ and has rather confined itself to very general, broad definitions about these three concepts without formulating generally applicable criteria for judging the requirements.⁸⁹ Overall the sanctions chosen need to be sufficiently effective to provide protection against unlawful discrimination,⁹⁰ which would entail the need to guarantee real and effective judicial protection.⁹¹ This in turn requires that sanctions must be adequate in relation to the damage.⁹² Another general remark that has been made is that sanctions need to be

⁸⁸ In relation to the requirement of proportionate sanctions, it has been elucidated that when financial compensation is chosen, it must enable the loss and damage actually sustained as a result of the discrimination to be made good in full (ECJ, *Marshall*, para. 26). With respect to compensation, the ECJ has furthermore specified that a ceiling on the amount of compensation would be problematic, especially when no ceiling would be set for similar infringements of domestic law (C-180/95 *Draehmpaehl*, paras. 28-30 (hereinafter: ECJ, *Draehmpaehl*). According to the Court a purely nominal amount of compensation would not be sufficient either (C-14/83 *von Colson*, paras. 18, 24 (hereinafter: ECJ, *Colson*); C-79/83 *Harz*, para. 24 (hereinafter: ECJ, *Harz*)).

⁸⁹ Tobler 2005, 10. Concerning the requirement of dissuasiveness, it is generally agreed that it is difficult to quantify deterrence, and even more so to determine the level which is ‘good enough’, see inter alia D. Shelton, *Remedies in International Human Rights Law*, OUP, 2005, 13; Tobler 2005, 17; P.H. Lindblom, ‘The Growing Role of the Courts and the New Functions of Judicial Process – Facts or Flummery?’, in P. Wahlgren (ed.), *Procedural Law: Court Administrations, Scandinavian Studies in Law*, Stockholm: Stockholm Institute for Scandinavian Law 2007, 292; C. McCrudden, ‘International and European norms regarding national legal remedies for racial equality’, in S. Fredman (ed.), *Discrimination and human rights. The case of racism*, OUP 2001, 251-307, 295.

⁹⁰ ECJ, *Draehmpaehl*, para. 24.

⁹¹ Inter alia ECJ, *Colson*, paras. 18, 23; ECJ, *Harz*, para. 22; ECJ, *Dekker*, para. 23.

⁹² ECJ, *Draehmpaehl*, para. 39.

tailored to the specific circumstances in order to respect these broad guidelines/requirements.⁹³ Obviously, the few clarifications that have been made remain rather general.⁹⁴

Furthermore, to the extent that clarifications are offered they are always formulated very carefully, rather about identifying possibilities – possible sanctions, and not really about ‘obligatory’ sanctions in the sense that a particular type of sanction should be adopted by the states in relation to particular infringements in order to have ‘effective, proportionate and dissuasive sanctions’.⁹⁵ So far the Court has not explicitly addressed the relative strength of sanctions in relation to these three requirements, nor when various sanctions could be used, what combination would actually be appropriate. This may be in line with the discretion left to Member States in this respect but utterly fails to clarify when particular sanctions would be necessary in order to have overall ‘effective, proportionate and dissuasive sanctions’, which are after all the criteria determining the boundaries of that state discretion.

In *Feryn* the ECJ starts by restating the goal of the Article 15 requirement that sanctions imposed by states must be effective, proportionate and dissuasive, and adds that as long as the sanctions chosen are suitable to reach the goal of the Directive, the Member States would be in line with their duties in terms of the RED.⁹⁶ The Court does enumerate sanctions that could be used by the national court; and most importantly, it takes up the ones the national court enquired about, namely a finding of discrimination by the court or competent administrative authority, publication of that finding, and prohibitory injunction, while adding two additional ones: a fine and the award of damages.

The Court thus at first sight proceeds with providing some further insights about what would amount to ‘appropriate’ sanctions in relation to cases without a direct victim of

⁹³ ECJ, *Paqua*, para. 46: in relation to financial compensation, adequate compensation requires the loss and the damage to be covered. The requirement of the need to tailor sanctions is also reflected in the AG’s Opinion (‘which remedy would be appropriate in the circumstances of the present case’, para. 28) and in the judgment of the ECJ (‘if it appears appropriate to the situation at issue in the main proceedings’, para. 39).

⁹⁴ There is a steady line of jurisprudence in relation to unjustified differential treatment which is not really relevant to the case in point but should not remain entirely unmentioned. In theory a case of unjustified differential treatment can be tackled by leveling up or leveling down (e.g. the disadvantaged group treated as the advantaged or the advantaged treated as the disadvantaged). With respect to the implementation of directives, the Member States can choose. However, as long as there is no legislative implementation AND in any event once the implementation period has expired (and takes effect directly) the only legitimate possibility is to level up: the only valid point of reference would be the situation of the ‘advantaged’ person (inter alia C-408/92 *Smith*, paras. 17-21; C-31/90 *Johnson*, para. 36; C-377/89 *Cotter and McDermott*, para. 19; C-28/93 *van den Akker*, paras. 15 -17).

⁹⁵ At most the Court formulates additional requirements in relation to the particular sanctions that were chosen by a Member State, see ECJ, *Colson*, paras. 18, 23; C-248/83 *Commission v Germany*, para. 10 (hereinafter: ECJ, *Commission v Germany*), ECJ, *Harz*, para. 19.

⁹⁶ ECJ, *Feryn*, paras. 36-37.

discrimination.⁹⁷ The translation by the ECJ of one of the possible sanctions to the situation at hand, that is to a case without a specific victim, by stipulating that the award of damages should be to the body bringing the proceedings,⁹⁸ is surely commendable.

However, it does not explicitly indicate which of these sanctions is particularly well suited to cases without a direct victim (in addition to the one of compensation going to the body bringing the proceedings). Furthermore, the enumeration is also replete with qualifiers, such as ‘if it appears appropriate to the situation at issue in the main proceedings’, ‘where necessary’ and ‘where appropriate’.

The AG’s Opinion seems to provide somewhat more guidance in this respect. He may not be very elaborate on the issue, but he does state that ‘in the main, purely token sanctions are not sufficiently dissuasive to enforce the prohibition of discrimination. Therefore, it would seem that a court order prohibiting *such behavior* would constitute a *more appropriate* remedy’⁹⁹ (emphases added). Admittedly, this is a rather general statement without reference to the particularities of the concrete case, but the last part does seem to hint at a clear preference for a prohibitory injunction in this case or cases like this one concerning public statements containing discriminatory selection criteria. It is a pity that the ECJ has not taken up this line of thinking.

While the ECJ cannot get into the application of the national law, nothing would prevent it from (and arguably it should try) giving some further guidance on the requirements of EC law concerning ‘effective, proportionate and dissuasive sanctions’, since these are meant to confine the discretion of the Member States’ national procedural autonomy.¹⁰⁰

8. A call for more ‘system reasoning’: Generally and applied to the *Feryn* case

The preceding paragraphs have confirmed that the law pertaining to the prohibition of discrimination is built on a complex interrelation of different concepts. Furthermore, different jurisdictions do not use identical paradigms concerning the equality principle and the prohibition of discrimination, which only buttresses the importance of building a coherent, internal logic and

⁹⁷ ECJ, *Feryn*, para. 38.

⁹⁸ ECJ, *Feryn*, para. 39.

⁹⁹ AG, *Feryn*, para. 28.

¹⁰⁰ ECJ, *von Colson*, paras. 18, 23 ; ECJ, *Harz*, para. 19, ECJ, *Commission v Germany*, para. 10; ECJ, *Dekker*, para. 23.

thus building a system.¹⁰¹ In relation to the prohibition of discrimination it is important to know the meaning of basic concepts like direct and indirect discrimination, whether there is an open or a closed justification model in relation to these two broad categories of discrimination,¹⁰² the construction of the model of review and the allocation of the burden of proof etc.

Broader rulings that are also elaborate could and should contribute to the building of a coherent, internal logic for this paradigm, which is consistently used,¹⁰³ thus building a system through so-called 'system reasoning'. Furthermore, having such a system and actually using it (repeating it) and thus clarifying the particular interrelation of the distinctive components, leads to structured and thorough reasoning, which is particularly important for cases on equal treatment.¹⁰⁴

This system reasoning seems even more in point in relation to preliminary rulings, in view of their goal to safeguard the uniform interpretation and application of EC law.

By providing additional clarity about the EC norms and their interrelation), the educatory value of the judgments is enhanced and they have important potential to prevent (the need) for other preliminary questions, thus contributing to the management of the staggering case load of the ECJ. In this respect it is useful to recall that while a preliminary ruling may be directed to this particular national court, the clarification given of the RED is obviously of more general relevance and has (potentially) broader ramifications.¹⁰⁵

One could argue that system building should not be the task of courts, but rather that of academics, since courts should focus on solving the case at hand. However, solving the cases at hand only benefits from the use of clear criteria and of a particular system. Hence it is not surprising that most high courts and quasi judicial bodies do have, to differing degrees, a certain

¹⁰¹ For a good account of the reasons why it is important that Courts adopt a solid model of reasoning – a model of review, especially in relation to cases concerning equal treatment and an attempt to identify what this model of review should look like in equality cases, see Gerards 2005, 4-8 (entire book).

¹⁰² The law on the prohibition of discrimination is becoming more and more sophisticated and distinguishes more and more categories of discrimination. In the RED for example two additional categories are identified: harassment and instruction to discriminate: Article 2, paras. 3 and 4.

¹⁰³ According to Sunstein minimalist decisions by judges would compromise predictability, Sunstein 2001, 219-220, 261 See also C.R. Sunstein, 'Beyond Judicial Minimalism', *Harvard Public Law Working Paper no 08-40*, 2008.

¹⁰⁴ Gerards 2005, 4-7. Gerards also argues that using set criteria with a particular set meaning is at the same time meant to reduce the influence of subjective views on the outcome of the case (ibid.).

¹⁰⁵ See also J.H.H. Weiler, 'The European Court of Justice and its Interlocutors', *Comparative Political Studies* 1994, 518-523.

system which they build and use,¹⁰⁶ while academia have a role in elaborating and fine tuning the system. The extensive analysis of the jurisprudence of the US Supreme Court and its system consisting of different tests and related levels of scrutiny is well known and does not need to be repeated here.¹⁰⁷ In a country like South Africa with its tarnished apartheid past, the equality jurisprudence of the Constitutional Court (CC) was eagerly awaited and closely scrutinized. The judges and their clerks understood the immense importance of transparent and systematic reasoning in this respect so as to enhance not only legal certainty but also legitimacy of any future judgments. Hence they took the lead in developing and streamlining the ‘system’ that had emerged after the first few cases on the equality provision in the Bill of Rights rather early on in *Harksen v Lane NO*.¹⁰⁸ Similarly some national equality bodies, like the Dutch Equal Treatment Commission, excel at system reasoning. This is especially relevant in regard to the ECJ as the Dutch system related to the General Equal Treatment Act also uses a system of closed justification for direct discrimination.¹⁰⁹

¹⁰⁶ At the same time it needs to be acknowledged that courts often do not provide extensive, principled reasoning for their rulings, see N. Huls, ‘Introduction: From Legitimacy to Leadership’, in N. Huls et al. (eds.), *The Legitimacy of Highest Courts Rulings: Judicial Deliberations and Beyond*, TMC Asser Press 2008, 10.

¹⁰⁷ Inter alia Gerards 2005, 365-513. In relation to the less well known case of Canada and its initial difficulties to find an appropriate ‘system’, see P. Hogg, *Constitutional Law of Canada*, Ontario: Thomson/Carswell 2007, 55.26-55.29. See also B. Vizkelety, ‘Discrimination Law – The Canadian Perspective’, *European Anti Discrimination Review* 2008, 28.

¹⁰⁸ CC, *Harksen v Lane*, NO 1998 (1) SA 300 (CC), in particular para. 53.

The Constitutional Court was confronted with the challenge to find a proper role for the word ‘unfair’ in the constitutional prohibition of unfair discrimination (both Section 8 of the interim Constitution and Section 9 of the 1996 Constitution contain prohibitions of unfair discrimination). Of course here also academics ponder(ed) and speculate(d) about the underlying reasons for particular choices made by the CC in developing its equality jurisprudence, and formulate(d) critical assessments in particular respects (e.g. S. Cowen, ‘Can Dignity Guide South Africa’s Equality Jurisprudence?’, *S.A.J.H.R.* 2001, 40-42). Still the system was explicitly build by the Court itself and has been followed closely by the Court since then in a relatively large number of cases (K. Albertyn & B. Goldblatt, ‘Equality’, in S. Woolman et al. (eds.), *Constitutional Law of South Africa*, loose leaf update 2008, 35.15-35.16, 35.39, 35.43, 35.75. In several respects the Court followed its own path, it established its system choosing not to follow academic commentary: *idem.*, 35.17 and 35.82).

¹⁰⁹ Inter alia J.H. Gerards, ‘Het Toetsingsmodel van de CGB voor de Beoordeling van Indirect Onderscheid’, in D.J.B. de Wolff (ed.), *Gelijke Behandeling: oordelen en commentaar 2002, 2003*, 78-80. The Commission tends to start with an identification of whether the facts reveal an instance of direct or indirect differentiation. In the case of direct differentiation they explicitly repeat (over and over) that this is prohibited unless there is an exception explicitly provided for. Subsequently they check whether there are any relevant exceptions and if so whether it is complied with (inter alia Opinion 2008-48, para. 3.3; Opinion 2007-100, para. 3.11, Opinion 2006-48, para. 4.8. Sometimes the Equal Treatment Commission even explains every single possible explicit exception, before checking its relevance and applicability (e.g. Opinion 2008-87, paras. 3.10-3.16)). In case of indirect differentiation it checks whether this differentiation is objectively justifiable, by consistently using the same steps of assessment in the same order, and using and repeating the same criteria (inter alia Opinion 2008-48, para. 3.3; Opinion 2007-100, para. 3.11, Opinion 2006-48, para. 4.8.

Like other international, supranational courts,¹¹⁰ the ECJ de facto also has added some ‘system’ through its jurisprudence. The concept of the prohibition of indirect (as opposed to direct) discrimination was indeed originally a jurisprudential construct.¹¹¹ However, several critical remarks can be made with regard to the extent to which the ECJ engages in system building. The Court does not tend to present a systematic overview of the basic principles of its system in relation to the prohibition of discrimination, while more elaborate system reasoning would enhance the ‘educatory’ value of the ECJ’s judgments and hence also its contribution to the uniform application of EC law.

Concerning the prohibition of discrimination, this lack of system reasoning has led to serious shortcomings in the jurisprudence and concomitant uncertainties with the national courts. Two striking examples, nicely exemplified in the questions of the Belgian court in *Feryn*, concern the fundamental distinction between direct and indirect discrimination¹¹² and the distinctive steps in the model of review. Regarding the latter, the Court is everything but consistent and elaborate about what is required in relation to a prima facie case of discrimination.

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The lack of a clear theory about the distinction between direct and indirect discrimination is remarkable in view of the fact that the possibility of a general ‘reasonable, objective justification’ only exists for indirect discrimination and not for direct discrimination. The Court even fails to expressly state this difference in justification possibilities in cases in which it is a

¹¹⁰ It is known that the jurisprudence of the European Court of Human Rights makes extensive use of system reasoning in the sense that it tends to repeat (in a more or less elaborated way) the ‘general principles’ and only then proceeds with the ‘application to the specific case’. Sometimes the Court is very extensive indeed in its restatement of general principles, even to the extent of approaching textbook quality, and even including principles that are arguably not necessary for the case at hand. See inter alia ECtHR, *Dogru v France*, 4 December 2008.

In relation to discrimination cases, the Court has developed a particular assessment model, which is somewhat more straightforward as there is a general open justification method. However, in several respects the Court is not consistent in its use of this system in the sense that it seems in several judgments to ignore particular steps in reasoning in several judgments. A good example here would be the goal-means assessment of the proportionality test (in the strict sense). While the Court expressly states not to engage in subsidiarity arguments, it sometimes does anyway. It is similarly inconsistent about assessments of suitability and the degree of fit (over- and under-inclusiveness), see Gerards 2005, 216- 221.

¹¹¹ See also S. Burri & S. Prechal, *EU Gender Equality Law*, EC 2008, 4.

¹¹² See supra, including the case law referred to.

¹¹³ See inter alia Gerards 2005, 342-345. In this respect it is striking that there is still a fundamental disagreement between academics (which has not been explicitly addressed by the ECJ) about the rebuttal of a prima facie case of indirect discrimination, more specifically whether this would concern a negation of the causal link (between the harm and the protected ground) or a justification proper and thus provides compelling reasons why the defendant has not observed his duty to avoid disparate impact (of a neutral measure). Compare in this respect Ellis 2005, 112 and Tobler 2005, 255.

central issue.¹¹⁴ Implicitly this distinction is made in that the Court does not (tend to) use the term justification in relation to direct discrimination, but rather it tends to use the concepts ‘rebuttal’, ‘derogation’, and ‘exception’.¹¹⁵ However, and this definitely does not contribute to a coherent system, while an official recognition of a possibility of justification of direct distinctions is still absent, the ECJ has on several occasions accepted the possibility of a justification without stating this expressly, and without giving reasons.¹¹⁶ Sometimes the Court, in one and the same case, even uses the concepts justification and exception interchangeably.¹¹⁷

The *Feryn* case provided the Court with a possibility to clarify (inter alia) these two matters. System reasoning would arguably be particularly called for in *Feryn*, as this is the first judgment on the RED, thus clarifying its content. Unfortunately, the ECJ missed several opportunities to do so in its judgment.

Firstly, it has been pointed out before that the ECJ does not answer the question pertaining to the dividing line between direct and indirect discrimination explicitly. This is particularly inappropriate in view of the fundamental uncertainty reflected in the national court’s questions in this respect. Answering this question more explicitly as suggested above, would not only have been more useful for the national court, enhancing its understanding of the relevant provisions of EC law, but would also have enabled the Court to clarify the system of EC non discrimination law, while making it more coherent.

Secondly, the national court also asked several questions about the presumption of discrimination (sub questions of question 4) as related to the shift in the burden of proof. However, the Court did not answer them (properly). A more serious attempt to engage in these questions, explaining them in the broader system of EC law as suggested above, would have

¹¹⁴ Tobler 2001, 125 and 127. Most often references to this fundamental distinction are implicit, e.g. in *P v S and Cornwall*, paras. 20-23. Exceptionally, there is an explicit acknowledgement of closed system of justification (the broad sense): e.g. C-203/3 *Commission v Austria* (OJ C 82, 02.04.2005, p. 4) para. 42, gives an explicit statement that facts revealed direct differentiation, followed by a check whether any of the derogations applied. See e.g. C-312/86 *Commission v French Republic*, where it is stipulated that the specific derogations provided for do not allow a generalized system of special rights or differential treatment. See also C-207/04 *Vergani* (OJ C 217, 03.09.2005, p. 20), para. 34; C-177/88 *Dekker*, para. 12; C-7/93 *Beune*.

¹¹⁵ Inter alia C-328/98 *Taylor*, para. 35, C-273/97 *Sirdar*, para. 26; C-154/96 *Wolfs*, para. 24; C-104/98 *Buchner*, paras. 21, 25; C-196/98 *Hepple*, paras. 23-26; C-207/04 *Vergani*, paras. 31-33; C-177/94 *Richardson*, para. 18; C-285/98 *Kreil*, para. 23; C-248/83 *Commission v Germany*, paras. 34-36.

¹¹⁶ Tobler 2001, 123-124.

¹¹⁷ Inter alia the recent judgment in C-388/07 *The Incorporated Trustees of the National Council for Ageing*, where there is sometimes reference to derogation/exception (paras. 40, 59, 60 and 62), sometimes to justification (para. 67), and sometimes even to both (para. 46). Possibly, this confusion is related to the particular position of age, as the FED allows for justification also for direct discrimination on the basis of age in Article 6 FED.

made for a more useful answer for the national court, while clarifying and strengthening the system. More concretely, the ECJ could have enhanced the understanding of the national court(s) by being consistent in its qualification of a public statement as an instance of discrimination and assessing the two distinctive instances of (possible) discrimination separately in terms of the allocation of the burden of proof (and the related model of review).

Thirdly, the first question of the national court gave the ECJ the opportunity to clarify to what extent an anticipation of customers' wishes can count as a justification, or as an excuse. The Court does not address this at all. While one could argue that this implicitly means that customers' wishes are utterly irrelevant, it would have been important to make the point in terms of (the system of) EC law. Some of the national equality bodies¹¹⁸ have rather clear (explicit) lines of jurisprudence on this issue. The Dutch Equal Treatment Commission does not only explicitly discard any attempts to justify an exclusionary vacancy or public announcement about recruitment policy by reference to customers' wishes, but actually brandishes attempts to anticipate and thus accept prejudices held by customers as in itself discriminatory. It even identifies a positive duty on the side of the service provider to actively create an inclusive non-discriminatory environment in its premises by proactively countering discriminatory actions and statements of (other) clients.¹¹⁹

In this respect the AG takes up his role of providing more elaborate reasons, by explicitly stating that customers' wishes are irrelevant to the application of the Directive. He could have been more precise by adding that it does not prevent a finding from a presumption in terms of Article 8, since it does not fulfill the conditions of any of the exceptions to the prohibition of direct discrimination the Directive provides. Nevertheless, this short statement sends an important message, which the Court could have easily taken up.

In other words, the ECJ has unfortunately not taken the outstanding opportunity the *Feryn* case offered to engage in system reasoning, which would have granted it the opportunity

¹¹⁸ See also the decision of the Belgian Labour Court in *C Murat en Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v D Yves en E-L BVBA* te 26 3 2007.

One of the arguments in rebuttal of the presumption of direct discrimination (an internal email in which it was stated that a foreigner would not do as a technician – sales person of safety equipment/installations) was also that some of the clientele would object to foreigners carrying out these services for them. The Court dismissed this as plainly against the text, purpose and spirit of the Anti Discrimination Legislation (A.R. nr 176.893).

¹¹⁹ This has been qualified as 'consumer discrimination', see inter alia J.H. Gerards, 'Kroniek oordelen CGB 2000-2003', *NJCM Bulletin* 2004, 637. Inter alia Opinion 2006-217, para. 3.14; Opinion 2006-48, paras. 4.6-4.7. See also Opinion 2002-156 and Opinion 2002-123.

of building a more coherent body of law pertaining to the prohibition of discrimination (as enshrined in the RED).

Conclusion

In view of the high expectations about the impact of the Racial Equality Directive, it is extremely important that the legal reasoning of the highest interpreter of that Directive is flawless and meticulous. Furthermore, when the preliminary questions by the national court are such that they reveal a serious lack of understanding of the basic concepts and enforcement mechanisms of that Directive, one would expect the ECJ to be particularly careful in providing an elucidating answer, and basically taking the opportunity to clarify the law under the RED, while engaging in system reasoning..

Unfortunately the ECJ did not rise to the occasion, at least not completely. The judgment should be hailed for its identification of a ‘mere speech’ instance of discrimination and its teleological construction of the legal standing provision. However, at the same time the Court fails to own up to the logical consequences of its conceptual position by not distinguishing consistently between two separate potential instances of discrimination, each with their own allocation of the burden of proof: the ‘(public) speech’ instance and the ‘practice’ instance.

Furthermore, the *Feryn* judgment fits an apparent tendency of the ECJ to prefer ‘concrete’ and thus rather ‘narrow’ rulings. ‘Abstract’ rulings that are also more elaborate, and explain the (relation to the) bigger ‘system’, would have led the Court to more informative answers. Consequently, such rulings would enhance the educatory value of the judgments, which in turn could have positive effects on the amount of requests for preliminary rulings. While this argument about reducing the workload might not be too strong in relation to the RED (considering the paucity of preliminary questions on the RED so far), several of the theoretical clarifications inherent in broader rulings and the related ‘system reasoning’ would be beneficial for all discrimination cases, also at the national level.

System reasoning would furthermore contribute to the building of a coherent body of EC non-discrimination law and thus reduce the emergence of ECJ judgments that seem difficult to reconcile with one another. Both these more elaborate theoretical clarifications and the overall coherence of EC non-discrimination law will facilitate the proper application of these standards at national level and boost the concomitant effective protection against discrimination.

Now it is up to the ECJ to decide whether or not to take up this call for broad rulings with system reasoning.

ANNEX: PRELIMINARY QUESTIONS AS ASKED BY THE NATIONAL COURT

- (1) Is there direct discrimination within the meaning of Article 2(2)(a) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin where an employer, after putting up a conspicuous job vacancy notice, publicly states:

‘I must comply with my customers’ requirements. If you say “I want that particular product or I want it like this and like that”, and I say “I’m not doing it, I’ll send those people”, then you say “I don’t need that door”. Then I’m putting myself out of business. We must meet the customers’ requirements. This isn’t my problem. I didn’t create this problem in Belgium. I want the firm to do well and I want us to achieve our turnover at the end of the year, and how do I do that? – I must do it the way the customer wants it done!’[?]

- (2) Is it sufficient for a finding of direct discrimination in the conditions for access to paid employment to establish that the employer applies directly discriminatory selection criteria?
- (3) For the purpose of establishing that there is direct discrimination within the meaning of Article 2(2)(a) of Council Directive 2000/43/EC ..., may account be taken of the recruitment of exclusively indigenous fitters by an affiliated company of the employer in assessing whether that employer’s recruitment policy is discriminatory?
- (4) What is to be understood by ‘facts from which it may be presumed that there has been direct or indirect discrimination’ within the terms of Article 8(1) of Directive 2004/43? How strict must a national court be in assessing facts which give rise to a presumption of discrimination?
- (a) To what extent do earlier acts of discrimination (public announcement of directly discriminatory selection criteria in April 2005) constitute ‘facts from which it may be presumed that there has been direct or indirect discrimination’ within the terms of Article 8(1) of [Directive 2000/43]?

- (b) Does an established act of discrimination in April 2005 (public announcement in April 2005) subsequently give rise to a presumption of the continuation of a directly discriminatory recruitment policy? Having regard to the facts in the main proceedings, is it sufficient, in order to raise the presumption (that an employer operates and continues to pursue a discriminatory recruitment policy) that, in April 2005, in answer to the question whether, as an employer, he did not treat people from foreign and indigenous backgrounds in the same manner and was thus actually a bit racist, he publicly stated: ‘I must comply with my customers’ requirements. If you say “I want that particular product or I want it like this and like that”, and I say “I’m not doing it, I’ll send those people”, then you say “I don’t need that door”. Then I’m putting myself out of business. We must meet the customers’ requirements. This isn’t my problem. I didn’t create this problem in Belgium. I want the firm to do well and I want us to achieve our turnover at the end of the year, and how do I do that? – I must do it the way the customer wants it done!’[?]
- (c) Having regard to the facts in the main proceedings, can a joint press release issued by an employer and the national body for combating discrimination, in which acts of discrimination are at least implicitly confirmed by the employer, give rise to such a presumption?
- (d) Does the fact that an employer does not employ any fitters from ethnic minorities give rise to a presumption of indirect discrimination when that same employer some time previously had experienced great difficulty in recruiting fitters and, moreover, had also stated publicly that his customers did not like working with fitters who were immigrants?
- (e) Is one fact sufficient in order to raise a presumption of discrimination?
- (f) Having regard to the facts in the main proceedings, can a presumption of discrimination on the part of the employer be inferred from the recruitment of exclusively indigenous fitters by an affiliated company of that employer?

- (5) How strict must the national court be in assessing the evidence in rebuttal which must be produced when a presumption of discrimination within the meaning of Article 8(1) of Directive 2000/43 has been raised? Can a presumption of discrimination within the meaning of Article 8(1) of Directive 2000/43 ... be rebutted by a simple and unilateral statement by the employer in the press that he does not or does not any longer discriminate and that fitters from ethnic minorities are welcome; and/or by a simple declaration by the employer that his company, excluding the sister company, has filled all vacancies for fitters and/or by the statement that a Tunisian cleaning lady has been taken on and/or, having regard to the facts in the main proceedings, can the presumption be rebutted only by actual recruitment of fitters from ethnic minorities and/or by fulfilling commitments given in the joint press release?
- (6) What is to be understood by an ‘effective, proportionate and dissuasive’ sanction, as provided for in Article 15 of Directive 2000/43 ...? Having regard to the facts in the main proceedings, does the abovementioned requirement of Article 15 of Directive 2000/43 permit the national court merely to declare that there has been direct discrimination? Or does it, on the contrary, also require the national court to grant a prohibitory injunction, as provided for in national law? Having regard to the facts in the main proceedings, to what extent is the national court further required to order the publication of the forthcoming judgment as an effective, proportionate and dissuasive sanction?’