ERA
Academy of European Law

European Union (EU) anti-discrimination law

Print version

Overview

European Union (EU) anti-discrimination law

Introduction to EU Anti-discrimination Law

Welcome to the e-learning course on European Union (EU) anti-discrimination law. This course has been developed as part of the seminar project that the Academy of European Law (ERA) implements on behalf of DG JUSTICE of the European Commission in the framework of the PROGRESS Programme.

The content of the course was provided by Mr Peter Reading.

The course has been developed to provide an introduction to the key concepts, developments and relevant case law concerning EU anti-discrimination law. It is intended to be interactive by using video presentations, examples from real cases and quizzes to test your knowledge. It is intended to complement the detailed seminars run by the Academy of European Law on anti-discrimination law, which provide more indepth analysis of the issues.

The course comprises seven modules on the main topics relating to EU anti-discrimination law. Each module includes lessons which consist of written analysis and commentary, as well as videos from speakers that highlight some of the key issues concerning the topic. Where appropriate the modules contain links to relevant legislation, cases, and websites.

Each module also contains a quiz on the issues raised by the topics. You can choose to take the quiz after studying the materials to assess what you have learnt, or in advance to assess your preliminary knowledge and help decide on which parts of the course you want to focus your attention. You are free to decide which parts of the course you study and how you go through the materials. There is no compulsory order, although you are more likely to understand all the topics by completing modules one and two first.

Module 1:
Overview of EU anti-discrimination law and human rights frameworks

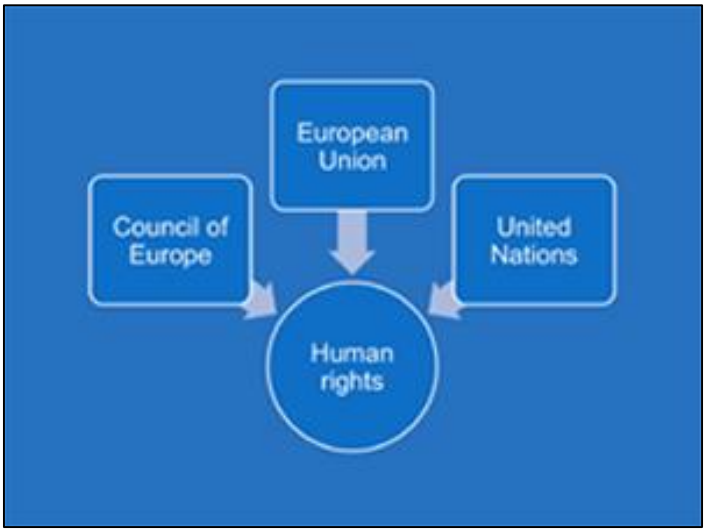
Introduction

The promotion of equality and respect for human rights is now a core element of the European Union's goals, legislation and institutions. The principle of equality has been an element of its foundations from its early days, and first developed in the context of gender equality. The Treaty of Rome of 1957 required equal pay between men and women, and provided the competence to develop the first Equality Directives: the Equal Pay Directive of 1975 and the Equal Treatment Directive of 1976, which prohibited discrimination on grounds of gender in access to employment, vocational training and promotion, and working conditions.

Yet it was not until the Treaty of Amsterdam of 1997 that the European Union introduced a specific power to combat discrimination on a wide range of grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. This power was set out in Article 13 of the Treaty of the European Community and had a significant impact. It led both to the introduction of a series of new Equality Directives as well as to the revision of the existing Gender Equality Directives.

In recent years there have also been two other major developments relating to the development of anti-discrimination law in the EU. Firstly, the powers and functions of the EU relating to equality and other human rights were recently amended and enhanced by the ratification of the Lisbon Treaty which entered into force on 1 December 2009 and made significant changes to the constitutional framework of the EU. Secondly, as a result of the Lisbon Treaty and other key decisions by the EU institutions, there is a growing convergence between the EU human rights frameworks and other intergovernmental human rights frameworks of the Council of Europe and the United Nations.

In order to fully understand and apply the developing EU anti-discrimination law it is necessary also to understand the place of equality as a human right, and how the EU, Council of Europe and United Nations human rights frameworks are increasingly interacting with each other.



[Description of the image:
This image illustrates the interaction of the Council of Europe, the EU and the United Nations in the area of Human Rights.
There are three boxes around a circle. “Council of Europe” is written in the first box, in the second “European Union” and in the third “United Nations”. From each box there is an arrow pointing to the circle. In the circle you can read “Human rights”.]

This module analyses three topics:

- the development and key aspects of the Anti-Discrimination Directives;
- the enhanced place of equality and other human rights in the EU since the Lisbon Treaty;
- the relationship between the EU system of anti-discrimination and human rights law with the Council of Europe and United Nations human rights systems.

It should be noted that this e-learning course focuses on the grounds of race, sexual orientation, religion or belief, age and disability. It does not place particular focus on EU gender anti-discrimination law, although there is some discussion where appropriate. Further background information relating to EU gender Equality law is available here.

An overview of the issues raised in this module is provided by Mr Peter Reading.

Transcript of the Video:

“Good morning. My name is Peter Reading and I am going to give you an introduction to the EU Equality Directives. I think there are four things which need to be borne in mind when introducing you to these topics. First of all, and perhaps the most important is to understand the context of why we need protection from discrimination in the context of protecting human rights. Secondly, I am going to give you an overview of the EU system and in particular some of the main developments which have occurred in the last few years. Thirdly, I’m going to introduce to you the interaction between the EU system and the Council of Europe

system of human rights protection because there has been an increasing convergence in those systems recently. And finally, I am also going to touch on the relationship between the EU system of human rights and the United Nations system because once again there have been some major developments in that regard in the last two years.

So first of all why do we need these protections and I think recent developments across Europe in relation to the economic recession and the impact that has had in relation to human rights issues, rising racism and xenophobia in a wide range of countries highlights that our protection from discrimination is vital and even more important in these particular times. We've seen in recent weeks for example in the Greek elections the far rights party Golden Dawn reached 7% of the vote for the first time and the first time its achieved seats in Parliament. Similar events have happened in France, for example the National Front party obtained approximately 18% of the votes. But it's also an issue that major political parties have been increasingly and concerningly raising in their rhetoric, so for example Mr Sarkozy stated that it was his intention to potentially renegotiate the Schengen agreement in terms of the free movement of EU citizens within the EU. So I think we need to be very conscious of the need to reinforce these protections by enforcing them and also consider ways in which those protections could be enhanced.

Secondly, in terms of the actual improvements in the system I think it is very important to bear in mind that the Lisbon Treaty which came into force in 2009 substantially strengthened the quality in human rights framework in the EU. So for example the EU Charter of Fundamental Rights has the same status as the other two treaties - that is the Treaty of the European Union and the Treaty of the Functioning of the European Union. That's very important because all EU institutions and all member states must comply with the Charter in developing and implementing EU law.

The place of the Directives is now in the Treaty on the Functioning of the European Union and in particular Article 19. The Charter itself is actually also broader than the discrimination provisions. So, for example, it provides the right to non-discrimination which includes other protected characteristics such as social origin, political opinion, language etc. and in that regard it is very important to bear in mind that the discrimination provisions in the Charter take a broad human rights approach to equality. Now in effect that's had an impact on the case law in relation to the Directive and one key example of that is the Test-Achats (C-236/09) case, which was decided in 2000 by the Court of Justice and it concerns the Gender Directive on Goods and Services. Effectively it looked at whether or not an exception for gender based insurance premiums was compliant with the Charter and the non-discrimination provision and that case held that it wasn't in fact compliant because the exception was too broad and didn't provide any justification for having such an exception so effectively that provision has now been ruled invalid and all member states need to comply with that by adjusting there national laws that implemented the Directive. So that's the EU and the Charter. What about the relationship between the EU and the Council of Europe? As I said there have been some major developments there.

Well the Treaty of the European Union specifically states that the EU must accede to the European Convention on Human Rights and there is a really important reason for that. Although all current member states to the EU must comply with the European Convention because they are parties to the Council of Europe there is no requirement that the EU institutions themselves, such as the European Commission or the European Parliament must comply with the European Convention. So it was decided that it was really important to ensure that that gap in protection was closed by the EU acceding to the Convention. Now the institutions are in the process of negotiating that with the Council of Europe and it is hoped that agreement can be reached either this year or next year. What that means in practice is that the EU institutions will need to comply with the European Convention, and it will be possible in the future for EU citizens once they have exhausted their domestic remedies to bring a claim either in the Court of Justice or in turn, if that is necessary, in the European Court of Human Rights in relation to possible breaches by the EU of the European Convention. So that could have significant impacts on the relationship between the decisions of the Court of Justice and the European Court of Human Rights.

I also wanted to mention a couple of cases that have highlighted the relationship between the EU and the Council of Europe to date because although there was no that direct relationship before in terms of acceding to the convention there's been some number of important cases that have dealt with the relationship to date. I am just going to mention one case and that's called DH v the Czech Republic and that's a case in the European Court of Human Rights concerning special schools for Roma children in the Czech Republic. It was argued that the placing of them in those separate schools from other children breached their Article 2 of Protocol 1 right to education together with the right to non-discrimination under Article 14. But what was really interesting in terms of the relationship between the EU and the Council of Europe is that in the case there was specific references made to the EU Directives in terms of helping to decide the law under Article 14. And the reason for that is to date the Article 14 jurisprudence especially on indirect discrimination hadn't been sufficiently developed. So the DH v the Czech Republic case looked at issues such as indirect discrimination whether statistical evidence can be used to prove that and what is the appropriate burden of proof required in relation to indirect discrimination cases and they used the concept under the Equality Directives to apply those to Article 14 and indirect discrimination. So it was a particularly helpful case in developing Strasbourg jurisprudence.

So that's the EU and the Council of Europe. I also just wanted to touch on the relationship between the EU and the United Nations because again there's been some major developments there. In 2008 the United Nations Convention on the Rights of Disabled People was agreed and that has meant that member states in the EU, in fact all of them now are parties to the Convention. The EU in a similar way to the European Convention on Human Rights decided it would be helpful if itself also ratified the UN Convention so it itself would become a party and that actually occurred in 2001. So since that time the EU institutions must now also consider whether they are compliant with the Convention. So what does that mean in practice? I think, firstly, it is important that the EU will have to set up an independent mechanism to monitor its compliance with the Convention. Those

negotiations are currently in process but it's planed that the European Commission, the European Parliament, the Fundamental Rights Agency and the European Ombudsman will share that responsibility to monitor such compliance. It could also have important practical effects on the Equality Directives because currently in relation to disability there is only a requirement to prohibit discrimination on grounds of disability in relation to the sector of employment. There was a proposal to expand that protection in 2008 to cover other sectors such as housing, education, health and so on but to date the EU institutions have been unable to agree that proposed Directive, which is obviously of great concern. But it also because of the EU ratification of the Convention may actually mean that the EU is not compliant with the Convention. And the reason for that is if you look through the Convention it requires discrimination to be prohibited not only in relation to employment, but also those key sectors I have just mentioned, whether that's housing, healthcare or education. So I think in the future we will see calls form interested parties, NGOs etc. for the EU to agree that proposed Directive in order to comply with the Convention. So there you can see an important way in which the ratification of the UN Convention will hopefully have a very positive impact on the development of the EU Equality Directives in the future.

So in summary I think there are three things to conclude from the structure that we now have. The first is we need to be vigilant about the protection of these rights. These aren't just issued of theory that lawyers look at in there law firms etc. These are really practical, serious concerns given the fact that there has been a rise in racism and xenophobia over the last year or two during the economic crisis. So we need these laws and the member states and their leaders need to take action to prevent such discrimination. Secondly, I think it's important to conclude that the Lisbon Treaty and the Charter of Fundamental Rights have been vitally important in reinforcing the place of human rights in the EU. But these laws haven't gone far enough in relation to equality. So we have this gap currently in relation to the proposed Directive, for example where the EU has been unable to finalise that better protection. And finally I think it is very important to conclude from the structure we have that you must understand the interaction between the EU, the Council of Europe and the United Nations if you are to fully understand how we can provide better protection and how we can maintain what we have.

Thank you very much for your time. "

The Race and Framework Directives

The Race Directive (2000/43/EC) and the Framework Directive (2000/78/EC) were developed pursuant to the powers relating to anti-discrimination under the Amsterdam Treaty and both agreed in 2000. All EU Member States were required to implement through appropriate laws and regulations the Race Directive by 19 July 2003 and the Framework Directive by 2 December 2003. In relation to the Framework Directive, Member States were also given the option if necessary to implement provisions relating to disability and age discrimination by 2 December 2006.

The two Directives differ in terms of both the groups that they protect from discrimination, as well as the scope of the sectors in which discrimination is prohibited.

The Race Directive provides protection from discrimination based on racial or ethnic origin. This includes protection for third country nationals, but does not extent to protection for discrimination based on nationality. This exception relates to immigration policy and Member States desire to retain control over such policy.

In terms of the scope of sectors in which racial discrimination is prohibited, the Race Directive provides the broadest protection of any of the protected groups at EU level. It prohibits discrimination in employment, occupation and related areas, social protection including social security and healthcare, social advantages, education, and access to and supply of goods and services available to the public including housing.

The Framework Directive provides for protection from discrimination for a much broader range of groups than the Race Directive as it protects groups identified by religion or belief, sexual orientation, disability and age. However, in contrast to the Race Directive, the Framework Directive is much more restrictive in its scope of sectors where discrimination is prohibited. It only applies to the fields of employment, occupation and related areas such as vocational training and membership of workers organisations.

Grounds Field	Race	Religion	Disability	Age	Sexual orientation	Sex
Employment & vocational training	Yes	Yes	Yes	Yes	Yes	Yes
Education	Yes	No	No	No	No	No
Goods and services	Yes	No	No	No	No	Yes
Social protection	Yes	No	No	No	No	Yes

[Description of the image:
This table illustrates the current state of play regarding the 'hierarchy of discrimination grounds'. It gives an overview of the grounds on which discrimination is prohibited under EU Law and the fields in which this prohibition applies.
The table includes seven columns and five lines.
On the first line the six grounds are enumerated– meaning: race, religion, disability, age, sexual orientation, sex.
In the first column you can find the four fields: employment and vocational training, education, goods and services, social protection.
On the line concerning the field of employment and vocational training there is written "Yes" for all grounds of discrimination.
On the line concerning education, this is the case for race, whereas for the other grounds "No" is marked.
On the line on goods and services you can find "Yes" in the box for race and sex discrimination cases. In the boxes for the other grounds "No" is noted.
This is the same for social protection.
The boxes including "Yes" are coloured in grey.]

All Member States must implement all the provisions of the Directives, and must not regress from those levels of protection. In addition, it is important to note that both the Race and Framework Directives lay down minimum requirements in terms of protection in those fields. Member States are free to and in many cases have developed national legislation that goes further than the requirements of the Directives.

It is also important to point out that in 2008 the European Commission proposed a new Equality Directive that would expand and harmonise protection from discrimination on grounds of disability, religion or belief, sexual orientation, and age. This was intended to expand on the protection provided in the Framework Directive and ensure that those groups have the same or similar levels of protection as groups identified by race and gender.

The proposed directive sought to prohibit discrimination in both the public and private sectors in relation to: social protection, including social security and healthcare; social advantages; education; and access to and supply of goods and other services which are available to the public, including housing. The proposed scope of protection is therefore similar to the Race Directive.

The proposal is still before the European Council as it has not been possible to date to secure unanimous agreement of all EU Member States. You can review the original proposal here.

Grounds / Field	Race	Religion	Dis-ability	Age	Sexual orient-tation	Sex
Employ-ment & vocational training	Yes	Yes	Yes	Yes	Yes	Yes
Education	Yes	Yes	Yes	Yes	Yes	No
Goods and services	Yes	Yes	Yes	Yes	Yes	Yes
Social protection	Yes	Yes	Yes	Yes	Yes	Yes

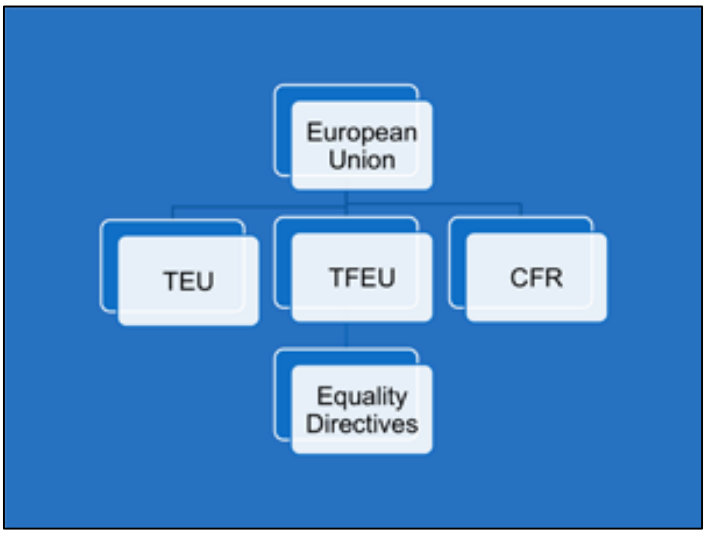
[Description of the image:
This table illustrates the scope of protection from discrimination under EU Law, in case the proposed Directive is adopted.
You can find again seven columns and five lines.
On the first line six grounds are enumerated– meaning: race, religion, disability, age, sexual orientation, sex.
In the first column there are the four fields: employment and vocational training, education, goods and services, social protection.
In all boxes except one “Yes” is written. The only place where you still find “No” is in the field of education concerning sex discrimination cases.
The boxes including “Yes” on the line “employment and vocational training”, on the row “race” and concerning sex discrimination regarding good and services as well as social protection are coloured in grey.
The word “Yes” is coloured in grey where it is mentioned for the grounds of religion, disability, age and sexual orientation regarding education, goods and services and social protection.]

The enhanced place of equality and other human rights in the EU

The Lisbon Treaty came into force on 1 December 2009 and made considerable changes to the constitutional framework of the EU. The frameworks relating to the duties and powers on equality and other human rights have been enhanced in a number of ways.

There are now three core documents relating to the duties and powers of the EU:

- Treaty of the European Union (TEU);
- Treaty on the Functioning of the European Union (TFEU)
- Charter of Fundamental Rights (CFR).



[Description of the image:
This illustration gives an overview of legal sources in the area of EU equality law and their hierarchy.
In this regard you can find five boxes, placed in a hierarchical order.
"European Union" is written in the box on top. Below you can find three boxes where you can read "TEU", "TFEU" and "CFR". The box where you can read "Equality Directives" is placed under the box "TFEU".]

The TEU sets out the aims and objectives of the EU. It places the rights to equality and other human rights at the heart of the EU, stating that:

"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." (Article 2 TEU).

In addition the TEU now includes a new provision that the Union 'shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child'. (Article 3(3) TEU).

The TEU also has the effect of incorporating the CFR into the legal order of the TEU and the TFEU such that it has binding effect and the same status as the two Treaties. The effect of the Charter in relation to equality is discussed below.

The TFEU organizes the functioning and the areas of competence of the EU. A new Part Two of the TFEU has been created which concerns non-discrimination and rights associated with citizenship of the EU. Article 19 (formerly Article 13 of the Treaty of the European Community) provides the power to take action combating discrimination:

"Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

Article 10 of the TFEU also introduced a new mainstreaming provision requiring all the EU institutions to work towards eliminating discrimination. It states that in *'defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'*.

The CFR was agreed by the EU in December 2000, but it did not become a legally binding instrument until the Lisbon Treaty came into force in 2009.
The Charter provides a human rights framework for the development and implementation of EU law (including Equality Directives).

The rights in the Charter are similar in many respects to the civil and political human rights set out in the Council of Europe Convention on Human Rights and the Charter indicates that insofar as the rights correspond to rights in the ECHR, the meaning and scope of those rights shall be the same (Article 52). In a number of respects, however, the Charter contains rights that are not contained in the ECHR such as the right to dignity and to legal aid. The effect of the Charter is that where EU law is developed and implemented, the Charter must be complied with by the EU institutions, and the Member States implementing the law (Article 51(1)). It does not however create any new powers or tasks for the EU (Article 51(2)).

Chapter III of the Charter is dedicated to issues of equality. Article 21 provides a freestanding right to non-discrimination in the implementation of EU law on 'any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation'. Of note, this is broader in scope than the grounds for which the EU can legislate against

discrimination under Article 19 of the TFEU, and unlike Article 14 of the ECHR, does not require another right to be engaged for the provision to have effect.

In addition, Chapter III contains a number of other significant provisions on equality, for example it provides that:

- everyone is equal before the law (Article 20);
- children shall have the right to such protection and care as is necessary for their well being (Article 24);
- the EU recognizes and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life (Article 26);
- the EU recognizes and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration, and participation in the life of the community (Article 26).

All EU legislation and policies must comply with the Charter, including the Equality Directives. The case discussed below demonstrats that relationship in practice.

Case study: The application of the Charter of Fundamental Rights to the Equality Directives

Association belge des Consommateurs Test_Achats ASBL Case C-236/09 1 March 2011

Facts:
A reference was made by the Belgian constitutional court to the Court of Justice of the EU (CJEU) on the interpretation of the exception in the Gender Directive on goods and services 2004/113/EC concerning insurance. Article 5(2) permitted differences in the insurance premiums and benefits between men and women where the use of sex is a 'determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data'. Any exceptions were required to be reviewed within five years (by 21 December 2012). The claimant argued that the provision in the Belgian national law that implemented Directive 2004/113/EC and provided for an exception pursuant to Article 5(2) was contrary to the principle of equality between men and women in the Charter.

Findings of the Court:
The Court relied on Articles 21 and 23 of the Charter of Fundamental Rights, which state that any discrimination based on sex is prohibited and that equality between men and women must be ensured in all areas. The CJEU held that Article 5(2) was incompatible with Articles 21 and 23 of the Charter as there was no time limit on the exception permitting difference in the insurance premiums between men and women. As a result the Court found that Article 5(2) was invalid at the expiry of the transition period for the exception (21 December 2012).

Implications:
All Member States that implemented the exception in the Gender Goods and Services Directive 2004/113/EC with domestic legislation have needed to review whether it is necessary to repeal or amend that legislation.

The relationship between the EU and the Council of Europe human rights frameworks

The EU strengthening of its human rights framework will also result in an increasingly close relationship between it and the Council of Europe's human rights frameworks. The Lisbon Treaty required for the first time that the EU accede to the European Convention on Human Rights (ECHR) (Article 6(2) TEU). Currently the ECHR constitutes general principles of EU law but is not binding on EU institutions.

As a result, once accession has been agreed, in the future it will be possible for persons in the EU Member States to bring claims in the European Court of Human Rights, where it is alleged that EU institutions have breached the ECHR, or Member States have breached the ECHR in implementing EU law.

The relationship between the EU and United Nations human rights frameworks

It is also relevant to recognize the effect of the increasing interaction between the EU equality and other human rights frameworks, and the human rights frameworks of the United Nations.

The United Nations' latest international convention to be agreed was the Convention on the Rights of Persons with Disabilities (CRPD). This provides disabled persons with comprehensive protection of a wide range of human rights in the fields of civil, political and socio-economic rights. These include rights relating to non-discrimination, freedom from torture or inhumane and degrading treatment, freedom from violence and exploitation, respect privacy, respect for the home and family, education, health, and an adequate standard of living.

The CRPD entered into force on 3 May 2008 and the EU ratified the Convention on 23 December 2010. This is the first time the EU has ratified an international human rights convention (as described above the EU also plans to ratify the ECHR). It means that all the EU institutions and Member States must consider and comply with the Convention in developing and implementing EU law and policies. This will have a significant impact on the interpretation and application of the EU Framework Directive relating to disabled persons as well as other relevant EU legislation and policies affecting disabled persons. For further discussion of the effect of the CRPD see module 6.

You may access previous seminar papers on this subject matter here.

Module 2:
Key concepts of EU anti-discrimination law

Introduction

This module examines the key concepts that are common to the Race and Framework Directives. It should be noted that the same key concepts apply in relation to the Gender Directives, but as indicated in the introduction those Directives are not examined in this e-learning course.

The module will examine:

- different types of discrimination that are prohibited;
- exceptions to the principles of non-discrimination; and
- enforcement of rights under the Equality Directives.

An overview of the issues raised in this module is provided by Ms Nicola Braganza:

Transcript of the Video:

Hello, my name is Nicola Braganza and I am a barrister. I specialise in discrimination and employment, immigration and asylum and mental health and community care law, and today I am speaking to you about non discrimination on the grounds of race, religion, disability, age and sexual orientation.

You will see that those grounds are covered by two particular Directives.
The first is Council Directive 2000/43/EC of 29th of June 2000 and that implements the principle of equal treatment between persons irrespective of racial or ethnic origin. That is referred to as the 'Race Discrimination Directive'.

The second is Council Directive 2000/78/EC of the 27th of November 2000. That establishes a general framework for equal treatment in employment and occupation. That is referred to as the 'Equal Treatment Framework Directive'.

Now why do we have these Directives?

The preambles in both the Race and the Framework Directive provide similarly in respect of the right to equality before the law and protection against discrimination for all persons, constituting a universal right. This is a fundamental right and that is recognized in various international instruments - they include the Universal Declaration of Human Rights, the United Nation's Convention on the Elimination of All Forms of Discrimination against Women, the international Convention on the Elimination of All Forms of Racial Discrimination and the United Nation's Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights. And also we find provision made within the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Now, discrimination based on racial or ethnic origin may undermine the achievement of the objectives of the EC treaty. And also the purpose of the

Directives is to ensure the development of democratic and tolerant societies which allow the participation of all persons, irrespective of race or ethnic origin.

So what is the purpose?

The purpose of this Directives is to prohibit any direct or indirect discrimination, be it on racial or ethnic origin grounds. On terms of the framework Directive, be it on the grounds of religion, age, sexual orientation or disability.

The other purpose is that the Directives aim to eliminate inequalities and promote equality between men and women, especially since women are often the victims of multiple discrimination and you will find this again in the preamble.

How is this done?

It is done by the appreciation of facts, from which inferences can be drawn of direct or indirect discrimination. Persons, as set out in preamble 19, who have been subject to discrimination should have adequate means of legal protection. The effective implementation of the principle of equality requires adequate judicial protection against victimisation, which is another concept and gives protection to those who suffer adverse treatment as a result of bringing a complaint concerning discrimination, which might as well arise in respect of somebody else who has suffered or suspects that they have suffered discrimination.

And finally how do we do that?

Within discrimination law, particular to discrimination law, are the rules on the burden of proof. And those rules are adapted as provided for at 21 of the preamble to the Race Directive. That, where there is a prima facie case of discrimination, if the complainant has made out that prima facie case, the burden then shifts to the respondent. It is for the respondent to prove that in fact the treatment arises and is in no way connected with discrimination. In certain circumstances, when the court is investigating facts, there is no need to apply the burden of proof.

And also what the Directive provides is that protection against discrimination is strengthened by the existence of a body with competence to analyse the problems involved. The Directives provide that it is important to bear in mind the minimum requirements and then it is for the national states to add if they wish to those requirements; that these are the basic principles that must be complied with. Finally 26 of the preamble provides that member states should provide effective, proportioned and dissuasive sanctions in case of breaches of the obligations. And the purpose of this obviously is that, if there are no effective sanctions, then the aims of the Directives will not be progressed or will not be upheld, because in fact, there will be no sanction faced to those who discriminate. In certain circumstances, very limited circumstances, discrimination can be justified. When for example there is a genuine determining occupational requirement, when the objective is legitimate and the requirement is proportioned. The Directives also make provisions of certain circumstances for positive action and you will see this also within Articles 4 and 5.

So we come now to the essential concepts, the key concepts that arise within discrimination. Article 1 of the Race Directive sets out the purpose of the Directive and that is to lay down a framework for combating discrimination on the grounds of racial, ethnic origin. The Framework Directive repeats this in similar language in respect of the other protected characteristics. The definition provided for in Article 2 is now for the purposes of the Directive the principles of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin. And that is set out in mandatory terms: there shall be no such discrimination.

So we come to the key concepts, the types of discrimination, that can arise.

Article 2 of the Race Directive provides first of all a definition for direct discrimination. Direct discrimination is very much about comparing like with like. One person is treated less favourably than another is, has been, or would be treated in a comparable situation on grounds of racial or ethnic origin. So the complainant says 'I have been treated in this way, I have been treated worse than this comparator'. That comparator can be someone that the complainant can specifically point to. This person in my workplace is not black, or is not disabled, or is not of this faith, or this sexual orientation and they were promoted, I was not promoted. They were given a bonus, I was not given a bonus. So you are comparing like situations. Or you have someone who in the past you can point to as a comparator, who has been a comparator. You can say 'previously this person was promoted and I have not been promoted. This person is white and I am not'. And so you are comparing again like with like. Finally you can rely on a hypothetical comparator. So you can say, 'if, hypothetically, a white male were working in this environment, they would have been promoted and I have not been promoted'. If you can then show that that difference in treatment is on the ground of whichever the protected characteristic is, that will then make out your direct discrimination case and it is then that you will have made out a prima facie case for the employer to prove. The burden of proof shifts to the employer to prove that there is no discrimination what so ever in the treatment complained of.

The second concept is indirect discrimination.

Indirect discrimination is very different. Indirect discrimination is all about equal treatment but with different consequences. So in indirect, we focus on the consequences.

What does the definition provide?

An apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin and causing there, same similar wording is provided within the Framework Directive, 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. So a provision applied to all, on its face apparently neutral, results in different consequences. So a person, again a black or an Asian person, as a result of this rule

is put into disadvantage, that same disadvantage is not suffered by the white comparator and as a result of that, it is then for the employer to show this was justified. The employer was justified in applying that requirement.

The next concept; harassment.

Harassment is defined in Article 2, and that sets out: unwanted conduct related to racial or ethic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. So you have several components: the conduct is unwanted; the conduct is connected to the protected characteristic, the racial or the ethnic ground; it takes place with a purpose or effect of violating the dignity of a person and also the complainant must show that it creates an intimidating, hostile, degrading or offensive, humiliating environment. That is harassment.

An instruction to discriminate against persons on grounds of racial and ethic origin is also deemed to be discrimination.

And then finally you have victimisation.

Victimisation is provided for in Article 9 and that sets out that member states shall introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence, as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment. So your complainant has suffered any adverse treatment, within the workplace again, not having access to certain training, not being promoted, not being provided with a bonus, excluded from meetings, or having been disciplined, and that, the complainant says, is because he or she raised a complaint of discrimination. And that connection then gives rise to complaint of victimisation.

What is the scope?

The scope is provided for within Article 3 and as it sets out extends to public and private sectors including public bodies; it extends to conditions for access to employment, to self employment, to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of professional hierarchy, including promotion; it applies to vocational guidance, vocational training, we see that at 1 b, to employment and working conditions, including dismissals and pay; it provides it applies to membership, involvement and organisation of workers or employers or any organisation, whose members carry on a particular profession, social protection, social advantages, education, access to and supply of goods and services available to the public, including housing.

Now, the burden of proof.

In respect of indirect and direct discrimination, once the complainant employee has proof, has made out a prima facie case of discrimination, so that in a direct discrimination complaint there is a difference comparing of treatment, that difference on the prima facie basis is on grounds of the protected characteristic,

the burden then shifts - and that is set out in Article 8. But also it provides that more favourable provisions can be implemented by member states - that is Article 2.(A2)

So what are the key issues, which arise in discrimination?

First of all, what is the treatment complained of? Identify what it is, what act or omission has given rise to the complainant saying in fact, this has happened to me on grounds of my race.

Who is the comparator? If it is direct discrimination, the complainant must identify, either an actual or hypothetical comparator. If there is no comparison, there is no direct discrimination.

Is intentional motive relevant? Well, it is recognised that a discrimination case is a very hard to prove. And it is also recognized that very often employers have no ill intention or no motive to discrimination, to discriminate, but nonetheless discrimination may arise. So intentional motive may be relevant, but it is not necessary.

Is there any direct evidence of discrimination? Now this again this is rare, but it might be in the history of the complaint, that the complainant can point to particular remarks that have been said. Which again will then provide an evidential basis, from which the complainant can invite the tribunal or the court to draw adverse inferences.

How has the complainant responded? What if the complainant has not raised any grievance until proceedings have been brought? This is something that is often relied on by employers. They say 'well, if this were a genuine complaint, then why hasn't the employee mentioned this before? Raised as a grievance?' Of course because this is not been raised before, that will not necessarily mean that it didn't occur. There can be a number of reasons why a complainant doesn't bring a complaint. But that is something to be aware of when you are bringing a complaint.

And time limits and delay. Well, In terms of time limits to bring a complaint there will be provisions, there may be provisions, for when the complaint must be brought before the court or the tribunal and also provision as to under what circumstances that time limit may be extended. But this is another key issue that arises in discrimination law.

What are the remedies in enforcement. Article 7 of the Directive provides that judicial or administrative procedures, including conciliation procedures, even after the relationship in which the discrimination is alleged to have occurred, has ended. So this provides for discrimination post employment. And associations, organisations or other legal entities with a legitimate interest may engage in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive. So this provides for Equality Commission, certain bodies and institutes, to intervene in the proceedings and to ensure that the purposes of the Directive are upheld. And paragraphs one and two refer then to

time limits, that without prejudice to national rules relating to time limits for bringing actions as regards the principal of equality of treatment.

So the sanctions are provided for in Article 15. Sanctions include payment of compensation to the victim. And that must be effective, proportionate, and dissuasive. Because if the sanctions are not so, the purpose and the aims of the Directives will not be progressed and upheld, perpetuated. Declarations, compensation, recommendations, financial loss provides the sanctions, non pecuniary loss in respect of compensation for and in the UK there is compensation for injury to feelings and aggravated damages in respect of the conduct of the respondent and whether that warrance aggravated damages.

In terms of practical guidance. Whether you are acting on behalf of the employer, or whether you are acting on behalf of the employee or whether you are viewing a case of discrimination as a tribunal or a court, what are matters to look out for within the discrimination complaint? The question is, very often and very crucial to complaints about discrimination, is the disclosure process, asking questions of an employer as to statistics and the workforce: How is the workforce made up? How much of the workforce is made up of black and ethnic minority staff? And how much is white? Or how many disabled staff and how many non disabled? And in terms of recruitment, what will statistics reveal to us? From the point of view of the employer to be able to point to statistics and to show monitoring, will reflect a commitment to equal opportunities. From the point of view of the employee, it will provide possibly evidence from which you can draw an inference that there's been discrimination, if for example there is a very disproportionate distribution of protected characteristics within the workforce. And if there've been past complaints, if an employer is regularly accused of discrimination and unsuccessful in those complaints and does nothing about it, again, this provides a basis from which you can invite the court to draw an inference of discrimination. Does the employer have equal opportunity policies? What training is provided in respect of those policies? Also in terms of best practice: guidance that is issued by equal opportunities bodies, to what extend does an employer follow that? Of course, the more there is an adherence and a recognition and compliance with such policies, the greater the commitment to equal opportunities and the more difficult it will be for an employee to invite a court to draw an inference of discrimination.

To what extend is then explanation for the conduct complained of. There is an explanation; it is more likely that discrimination has not occurred. And what is the degree of the treatment complained of? Is the treatment, well this gives rise to the issue of is this simply a bad employer, an unreasonable employer, or is this a discriminatory employer. If the employer is unfair, unreasonable to all his staff, that will not result in discrimination. He might be more unreasonable or she might be more unreasonable to some staff, staff with a protected characteristic, in which case that will also be or amount to direct discrimination that will give rise to an inference being drawn.
So we turn now to the second Directive 2000/78/EC, the Framework Directive.

The protected grounds within the Framework Directive are religion or belief, disability, age or sexual orientation. And the preamble again provides at 11, that discrimination based on any of these grounds may undermine the achievement of

the objectives of the EC treaty, in particular the attainment of high level of employment and social protection raising the standard of living and the quality of life, economic and social cohesion and solidarity and the free movement of persons. And to this end, set out at recital 12, any direct or indirect discrimination based on those grounds shall be prohibited throughout the Community.

There are exclusions and adjustments. The Directive shall be without prejudice to national provisions laying down retirement ages. The provision of measures to accommodate the needs of disabled people in the workplace plays an important role in combating discrimination on grounds of disability. This is a concept particular to disability, making reasonable adjustments to accommodate disabled persons. The requirement does not require, the Directive does not require, the recruitment, promotion, maintenance and employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training without prejudice to the obligation to provide reasonable accommodation for those with disabilities.

Exclusions are also provided for within the preamble at 18, 19 and 22 and they include the armed forces, police, prison, emergency services. At 19, provision is made for to safeguard and combat effectiveness of the armed forces. At 22, without prejudice to national laws or marital status. In very limited circumstances, it is set out at 23, a difference of treatment may be justified where a characteristic related to religion, belief, disability, age or sexual orientation constitutes a genuine and determining occupational justification, as we saw in the Race Directive.

Exclusions are further provided for within 24 to 27 of the Directive and the preamble therein, extending to churches, religious associations - there the difference in treatment may be justified in certain circumstances and, without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages, that such measures may permit organisations of persons of a particular religion, belief, disability, age or sexual orientation, where the main object is to promote the needs of those persons.

Again, the burden of proof, as we discussed in the Race Directive, is similarly reflected in the Framework Directive. That the rules of burden must be adapted. So where there is a prima facie case of discrimination the burden shifts. However, in respect of religious discrimination it is not for the respondent to prove the plaintiff adheres to a particular religion; that is for the complainant to show. Or has a particular disability; that is for the complainant to show. Is of a particular age or has a particular sexual orientation; the burden there rests with the complainant. And this is provided in prospect of burden of prove at Article 10.

The key concepts

Article 1 provides for the framework for combating discrimination. Article 2 refers to direct discrimination, indirect discrimination, unless it is justified, and in respect of those with a particular disability, the employer is obliged under national legislation to take appropriate measures in line with the principles in Article 5, to eliminate disadvantage. Article 3 provides for harassment wich is defined in the

same ways we saw in the Race Directive. Article 11 provides for victimisation, again this is framed in the same terms.

Reasonable accommodation and adjustment is crucial and particular to disability discrimination. Article 5 introduces a particular concept that is crucial and central to discrimination on grounds of disability or anti-discrimination in respect of disability and that provides for reasonable accommodation. And what that means is that an employer is required to make reasonable adjustments to accommodate an individual's disability.

What does Article 5 say? To guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided - it is set out in mandatory terms. And what this means is that employers shall take appropriate measures, when needed in a particular case, to enable to allow a person with a disability, to have access, to participate, to advance in employment, or to undergo training, unless such measures impose a disproportional burden on the employer. So an employer can say, I couldn't provide special lighting, I couldn't provide special seating because it would have been a disproportional burden on my finances or on my, on the working environment. But he has to then make that case out. Otherwise, there is a requirement that the employer commits to and implements those reasonable adjustments. And it is set out as well, that the burden shall not be disproportionate, when it is sufficiently remedied by measures existing within the framework of the disability policy of the member state concerned. So again, this is a reference to what national law provides in respect of reasonable adjustments. The preamble refers to this at 20 that appropriate measures should be provided and specifically, effective and practical measures to adapt the workplace to the disability. So, for example, adapting premises, adapting equipment, adapting working time, adapting the distribution of tasks or the provision of training or integration resources. In order to determine whether the measures in question give rise to a disproportional burden, and this of course is important from the point of view of the employer, the employer who says 'I could not carry out these reasonable adjustments in respect of this particular disabled person', 21 provides that account should be taken in particular of the financial and other costs entailed, the scale and the financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance. So regard will be hand to the size of the employer, the resources available to the employer, but also the steps that the employer has taken to first of all consider what reasonable adjustments should be made and how these reasonable adjustments could be implemented. And even the extend to which they could be implemented; it may be that not all can be implemented but some can. So it's not simply a case where the employer can rely on not having financial resources. The employer will need to show that efforts have been taken and for whatever reason the adjustments could not be put in place.

Justification

Now, Article 6 moves on to justification in respect of discrimination arising on grounds of age. And it sets out, if objectively and reasonably justified, by a legitimate aim, including legitimate employment policy, labour market and

vocational training objectives and if the means of achieving that aim are appropriate and necessary, the difference in treatment on the ground of age can be justified, which is different from the other protected characteristics, in which direct discrimination can not be justified. So differences of treatment may then include the setting of special conditions on access to employment, vocational training, employment and occupation, the fixing of minimum conditions of age, professional experience or seniority, fixing of a maximum age for recruitment. If these can be objectively justified, the employer is entitled to impose them.

So when will a person qualify as disabled? Definitions that arise.

There is no specific provision about disability, but the question will be whether there is a long term adverse effect resulting from a mental or physical impairment.

When will the duty to make reasonable adjustments be triggered?

Well, once it can reasonably be assumed that the employer is aware of the disability, it's been brought to the employer's attention and the individual is suffering a disadvantage by reasonable disability, at that point is there a duty to make reasonable adjustments?

The definition of religion or belief.

Again, this will be particular to the circumstances of the case. In so far as the complainant can rely on religion or belief, both of which in case law have been given wide definition, can then be relied on.

How is sexual orientation defined? When will a person be discriminated on the grounds of age?

These are all key issues that arise in combatting discrimination. And again, how to define the comparator? Is the comparator hypothetical or actual? What about perceived discrimination? Well very importantly, the Directives provide that there shall be no discrimination on grounds of race or on grounds of sexual orientation. They do not set out on grounds of his or her sexual orientation. So that means that first of all it need not to be on grounds of this specific, the characteristic is something specific to the complainant, which is a case of common and actual, that gives that example, but also perceived discrimination, if discrimination arises on the basis that the employer acts in a certain way because that employer assumes, believes or takes the view that the employee is gay, but the employee may not be gay. It does not provide in the Directives that the protected characteristic has to be particular to the complainant. The complainant doesn't have to be gay to suffer discrimination on the grounds of being gay.

And finally, guidance and evidence.

Again, what are the sort of issues that arise within discrimination cases? What are the aspects to look to in terms of evidence, whether from an employee point of view, an employer point of view or the tribunal or courts point of view? Is there a complaints procedure in terms of the employers commitment to discrimination?

Has the complainant brought an internal grievance and is there a record of that complaint? What is the situation in respect of human resources? Again, is there a commitment in terms of human resources being involved in the implementation of equal opportunities in the workplace? Questionnaires, something I referred to early on. Do the questionnaires reveal more about the workforce and the way equal opportunities are upheld? Or do the statistics? have there been past complaints? In respect of the employee, ask for the personnel file. What does the personnel file reveal about that employee's work history, or how the employer has assessed that employee. And also, are there witnesses to the discrimination? Again, in terms of evidence, are there witnesses to remarks having been made or are there witnesses to treatment of other comparators? Remedies provided for again in terms of declarations of discrimination, compensation, recommendations for future adjustments. Other remedies to consider are mediation between the parties, conciliation, is there a possibility of return to work,is there a possibility of more training for employers and more monitoring and more review of the monitoring.

And finally as a last word, there are certain points, principles if you like, to remember.

Treatment can be unfair, it can be unreasonable, it can be harsh; that will not make it discriminatory. You have to show a difference in treatment in respect of direct discrimination. You have to show a difference in consequence in respect of indirect discrimination.

Discrimination may arise without explicit reference, there may not be a specific reference to 'you were not promoted because you are black' or 'you were not allowed this extra perk because of your sexual orientation'. So it is important to analyse the circumstantial evidence and see what inferences can be drawn.
Intention may feature but it is not a requirement. There may be best intentions, and yet still discrimination arises. A woman can discriminate against a woman. The perpetrator can have the same protected characteristic.

Time limits can be used both ways. They can undermine a genuine concern about a treatment, if it is not raised; did it actually happen or did it actually cause the effect that's been complained of? And equally the other side of that coin is that it is a very politically sensitive and difficult matter to raise. It may be that the employee was concerned about raising it, concerned about his or her future employment in that particular workplace. So time limits can be used in both ways.

And finally remember we are all different, which should be celebrated, but before the law, there must be equality of treatment.
Thank you very much.

Types of discrimination that are prohibited

There are four core types of discrimination that are prohibited under both the Race and Framework Directives:

- direct discrimination;
- indirect discrimination;
- harassment;

- and victimisation.

Direct discrimination occurs where a person is:

- treated less favourably than another person is, has been or would be;
- the other person is in a comparable situation; and
- the treatment is on grounds of racial or ethnic origin (in relation to the Race Directive), religion or belief, sexual orientation, or disability (in relation to the Framework Directive).

In relation to the grounds of age, a different test applies as direct age discrimination can be justified. This is examined in more detail in module 5 on age discrimination.

The crucial element of direct discrimination is determining whether the persons are in a comparable situation. There may not always be an actual comparator, in which case a hypothetical comparator may be sufficient to establish direct discrimination.

Example:
The owner of a hotel tells a Black couple that arrive to book a room that he does not want migrants staying there and refuses to allow them to stay. This is unlawful direct race discrimination in the provision of a service.

Indirect discrimination occurs where:

- an apparently neutral provision, criterion or practice is applied to persons of a protected group (identified by racial or ethnic origin, religion or belief, sexual orientation, disability or age);
- the provision, criterion or practice would put that group at a particular disadvantage compared with other persons; and
- the provision, criterion or practice is not objectively justified.

In order to establish that a provision, criterion or practice is objectively justified, it must be shown that there is both a legitimate aim involved, and that the means of achieving the aim are "appropriate and necessary", in other words that the means are proportionate.

Example:
A job involves travelling to lots of different places to see clients. An employer says that, to get the job, the successful applicant has to be able to drive. This may stop some disabled people applying if they cannot drive. But there may be other perfectly good ways of getting from one appointment to another, which disabled people who cannot themselves drive could use. So the employer needs to show that a requirement to be able to drive is objectively justified, or they may be discriminating unlawfully against people who cannot drive because of their disability.

In relation to disability discrimination, to addition to direct and indirect disability discrimination being prohibited, there is also a requirement on employers and any

other persons to which the Framework Directive applies to make reasonable adjustments. This is examined in module 6 on disability discrimination.

Harassment occurs where there is:

- unwanted conduct related to any of the protected grounds of race, religion or belief; sexual orientation, disability or age;
- the conduct has the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment.

Example:
An employer makes a job applicant feel humiliated by telling jokes about their religion or belief during the interview. This may amount to harassment.

Victimisation occurs where:

- a person is treated adversely;
- because they have made a complaint of discrimination, brought discrimination proceedings or helped another person make a complaint or bring such proceedings.

Example:
An employer does not shortlist a person for interview, even though they are well-qualified for the job, because last year the job applicant said they thought the employer had harassed them on grounds of their sexual orientation and had made a complaint. This may amount to victimisation.

You may access previous seminar papers on this subject matter here.

Exceptions to the principles of non-discrimination

There are several key exceptions to the general principles of non-discrimination which apply in both the Race and Framework Directives as well as the Gender Directives: genuine occupational requirements; and positive action measures.

In relation to direct and indirect discrimination, an exception to the general principle of non-discrimination applies where there are genuine occupation requirements relating to a protected characteristic. There will be no unlawful discrimination where it can be shown that:

- by reason of the nature of the particular occupational activities or context in which they are carried out;
- the characteristic (race, religion or belief, sexual orientation, disability or age) is a genuine and determining occupational requirement;
- provided the objective is legitimate and the requirement is proportionate.

Example:
A charity works with gay men and women that have suffered bullying at work and in education, or violence relating to their sexual orientation. They want to only employ gay counsellors as the NGO believes they would be better able to relate to the gay victims and provide advice. This would probably be a genuine occupational requirement and not be unlawful discrimination.

You may access previous seminar papers on this subject matter here.

There is also a specific exception relating to genuine occupational requirements and religion or belief under the Framework Directive. This is examined in module 3 on religion or belief.

Positive action provisions in the Race and Framework Directives are a different type of exception. Their aim is to permit measures that prevent or compensate for the disadvantage suffered by the protected groups in employment (Race and Framework Directives) or other sectors such as education and the provision of services (Race Directive). The aim of positive action provisions is therefore to promote greater equality through policies, programmes or other measures. Case law has established that in order to be lawful positive action measures must:

- address a particular disadvantage of a group which is supported by evidence;
- be proportionate; and
- only continue as long as the disadvantage continues.

It does not, however, permit positive discrimination in favour of a protected group where one group is automatically given preferential treatment. This would be unlawful discrimination.

Example:
A local fire service identifies from its monitoring data that women are under-represented as fire fighters. The service makes clear in its next recruitment exercise that applications from women are welcome and holds an open day for potential women applicants at which they can meet women fire fighters. However, the fire service must not guarantee that all women will get through the initial stages of the application process, regardless of their suitability.

The only exception to this is the protected group of disabled persons. It is not unlawful to provide preferential treatment to disabled persons. This recognises that disabled people generally face many barriers to participating in work and other activities. You can choose to treat a disabled job applicant more favourably even if they are not at a disadvantage due to their disability in the particular situation.

Example:
An employer has a policy of shortlisting and interviewing all disabled applicants who meet the minimum requirements for their jobs. The law would allow this. It would not be unlawful discrimination against a non-disabled applicant who also meets the minimum requirements but is not shortlisted.

Enforcement of rights under the Equality Directives

An important aspect of anti-discrimination law is the measures which enable persons to bring discrimination claims and enforce their rights under the Equality Directives.

All the of the Equality Directives (the Race, Framework and Gender Directives) require Member States to ensure that there are judicial and/or administrative procedures for the enforcement of the obligations under the Directives.

In relation to the discrimination claims, an important principle which applies to both direct and indirect discrimination is the burden of proof.

The Race and Framework Directives require that:

- where claimants prove facts from which it can be presumed that there has been direct or indirect discrimination;
- it will then be for the respondent to prove that there was in fact no discrimination.

In other words, the burden of proof will shift to the respondent, once the claimant has proved facts from which discrimination can be presumed. The reason this procedure was introduced is because discrimination claims can be very hard to prove. It was therefore considered appropriate to specify in the Equality Directives how the burden of proof should operate for discrimination claims in all the Member States.

You may access previous seminar papers on this subject matter here.

Finally, the Race and Framework Directives require Member States to set out the rules on sanctions for the infringement of the national laws implementing the Directives. The sanctions may consist of payment of compensation to the victim or other measures such as requiring the organisation to change its policies or practices. The sanctions must be effective, proportionate and dissuasive.

You may access previous seminar papers on this subject matter here.

Module 3:
The protected grounds of racial or ethnic origin

Introduction

This module examines in more detail the protection from discrimination on the grounds of racial or ethnic origin.

An overview of the issues raised in this module is provided by Mr Adam Bodnar which highlights key issues relating discrimination on grounds of race, religion or belief and sexual orientation.

Transcript of the Video:
Good afternoon Ladies and Gentleman. The topic of today's lecture is discrimination due to other grounds that are guaranteed under the Directives of the European Union and specifically, discrimination due to racial or ethnic origin, discrimination due to religion or belief and discrimination due to sexual orientation.

I would like to underline to start with that Article 19 of the Treaty on Functioning of the European Union provides for a competence of the European Union to legislate in selected areas to counteract discrimination. Specifically, in Article 19 of the Treaty some specific grounds are enumerated where the European Union may legislate. The Union cannot go outside of those grounds and racial or ethnic discrimination, religion or belief, or sexual orientation are regarded as those grounds under which the European Union may legislate. As a result of this the European Union institutions have adopted a certain set of legislative acts regulating the prohibition of discrimination, namely Directive 2000/43/EC as well as the Directive 2000/78/EC. Those Directives and it is the nature of directives, have to be implemented by the member states and member states in general implemented them, otherwise they would face some financial consequences. So basically when we look into the framework for protecting against discrimination, we should remember that there are not only directives but also some legislative provisions binding in different member states.

Moreover, in some states the scope of protection offered against discrimination might be broader than the scope of the Directive as such and it is a quite natural process because sometimes the domestic constitutional regulations may go further than the EU law even requires. But in some other countries there provisions protecting against discrimination have basically the same value and the same scope as the Directives require and such countries do not even go further by one stage than the Directive requires. Such an example is Poland, my country, in which the Directives were just implemented and the legislator didn't adopt any additional regulations.

When we talk about the protection against discrimination we should also remember that some protection is offered by the European Convention on Human Rights, specifically Article 14 of the European Convention on Human Rights. However, this provision has a limited applicability. Why? Because article 14 may be

used only in connection with some other provision under the Convention, only in a situation when some other right guaranteed under the Convention is violated. So as an example, when in the case of Paraskeva Todorova v Bulgaria (ECHR 25-3-2009), the European Court of Human Rights found that Article 6 was violated; Article 6 which states about right to court . Why? Because the Court made a general statement concerning the person of Roma origin. Basically, the Court refused to suspend the sentence for the Roma woman claiming that she belonged to a minority group which in general does not regard suspended sentence as an ordinary sentence. So this general motivation of the Court, this reference to some general categorisation of the Roma people in individual case was regarded as a violation of Article 6 of the Convention and Article 14, which is the prohibition of discrimination in enjoyment of any rights guaranteed by the Convention.

The system of the European Convention includes also Protocol No. 12 to the Convention. Protocol No. 12 guarantees the protection against discrimination, and differentiated unjustified treatment, in any spheres of applicability of law. So if a certain state would adopt Protocol 12 then theoretically the ECHR, the Strasbourg Court could even consider the different retirement age for men and women, or any other situation when there is a differentiated treatment between men and women, or between different societal groups. That's why countries are pretty much afraid of ratifying the Protocol No. 12. They claim that may interfere too much with their domestic legislation and only a few countries such as Finland, or such as Spain has ratified the Protocol No. 12 and in practice it does not have a substantive and extensive use in shaping the current anti-discrimination law.

When we look into the general field of application of the EU Anti-Discrimination Directive we can see two, I would say specific observations. One is such that under the Directive 2000/43/EC, which prohibits discrimination due to racial or ethnic origin, such discrimination is prohibited almost in all social field of activities. If you want to be a volunteer for example in UEFA, European Championship and you are discriminated because of your ethnic origin, it would be a violation of the Racial and Ethnic Discrimination Directive. If you are dismissed from your work place because you have a Congolese fiancée and your boss does not like people with black skin, your rights are also violated under the Directive. If Roma children are refused to attend an ordinary school and are sent to a school for mentally retarded persons then it is also a violation of the Racial Discrimination Directive. If the real estate agent is not providing the possibility to rent a house in a certain residential district, to people with Asian faces then it will also be a violation of the Racial Discrimination Directive. And finally, if you have people who are refused access to discos, restaurants, theatre, cinema because of their racial ethnic origin it will also be regarded as a violation of the Racial Discrimination Directive.

On the other hand, when we look into such grounds of discrimination like sexual orientation, disability, age, religion or belief their applicability is very limited. So, for example, those grounds are protected only in such fields like employment, volunteering, vocational training, member states trade union, professional organisations. Basically the whole world of our employment, of our personal development as employees or self-employed persons is covered by the scope of those Directives. But there are some situations where people cannot be protected under the Directives. So, for example, if you have a Sikh who is wearing a turban

and who is not admitted to enter into the theatre because of some security reasons or because someone wants for him to take off his turban, he cannot claim under the Directive that he is discriminated due to his religion in access to goods or services publicly offered. Why? Because the Directive does not cover this situation. Maybe the national legislation covers this situation but the Directive does not offer protection here. There are some ideas to adopt so called horizontal directives so that the directive would cover all different grounds of discrimination and would be applicable to all those different situations of social life but until now such directive has not been adopted. There were some proposal but they didn't end up with their final text and with their legislative texts which would be then implemented by the states.

When we look into the first ground of discrimination, racial or ethical origin, we can see that there is no specific definition of racial or ethnic origin in the Directive 2000/43/EC. So in order to define what is racial or ethnic origin we should look into some other documents, such as the United Nations Committee on the Elimination of Racial Discrimination, recommendations or comments, or we should look into said documents of such organisations like the European Commission against Racism and Intolerance (ECRI).

If we look into the definition of racial or ethnic origin we should look into additional documents which are adopted in the work of international organisation, which are specialised in protection against different forms of discrimination and such bodies like those created by the Council of Europe or the United Nations are especially relevant here. Basically I claim that we shouldn't stick strongly to some established concept of racial or ethnic origin. If a certain minority is not commonly regarded as a national minority in a given state, it does not mean that an individual person discriminated in the work place will not be a victim of discrimination under this Directive. So I would suggest there is a need for a flexible approach here and we should always remember that the corner stone behind the prohibition of discrimination due to racial or ethnic origin is human dignity. So when we can show that there is some reason of discrimination that is just pushing strongly the person's human dignity then we can most probably easily claim that the Directive in this situation is applicable.

I would like to say that there are not many cases concerning discrimination due to racial or ethnic origin decided by the European Court of Justice in Luxembourg. There are plenty of cases decided by domestic courts. There are cases concerning refusal to access the discotheque in Budapest, there are cases concerning exclusion of Roma people from a restaurant in Poznan in Poland. So such cases basically appear on a daily bases in the life of ordinary courts in different member states of the European Union. With respect to the Luxembourg Court the leading case is a judgment decided on the 10 July 2008, in case Feryn (C-54/07). This case was brought to court by the Belgium Centre for Equal Opportunities and Combating Racism. It was a case brought as a follow up to a public statement made by one of the managers of the Feryn company. The manger claimed that his clients do not wish that doors to garages are installed by some immigrants. And basically because of that he stated that the firm will not employ immigrants at all. The case is interesting because the Belgian Centre for Equal Opportunities decided to bring the case to the court without having an individual victim. There was no immigrant

that would apply to this Feryn company and would be refused the possibility to be employed in this company. Quite otherwise the Belgian Centre for Equal Opportunity brought a case on the basis of this general situation that such a policy, such treatment of potential employees is in itself discriminatory. The CJEU agreed with this. The CJEU stated that such public statements made by the employer could dissuade certain candidate from submitting their CVs and applications and thus, such statements hinder the access to the labour market. Furthermore, the CJEU stated that such public statement may lead to the presumption that the employer has a recruitment policy which is directly discriminatory. So this case is an interesting warning to any employer that an employer cannot make public statements in such a general fashion and claim that he is applying a certain policy that could be discriminatory. When we compare this situation to a quite regular advertisement in a newspaper. When the employer is making the advertisement that he is looking for a shop assistant who is a woman and second, younger than 25 years old, then such an advert is directly discriminatory. There is no general occupational reason behind employing women younger than 25 years old to become shop assistants in a shoe shop.

I would like to underline that cases concerning racial discrimination do not happen often because employers are quite aware that basically you shouldn't discriminate people because of their racial and ethnic origin. But cases of discrimination, for example in access to goods and services are quite often and usually when you read some handbook devoted to case law appearing under the racial equality directive then those cases are usually of that kind; that someone was not allowed to enter into the club, restaurant, theatre, was refused to rent a room or, for example he was not served by a waiter in a restaurant.

The most interesting example I have ever heard concerning the applicability of the Directive on Racial Discrimination is an example given to me by my students from Italy. They told me one day that in their local restaurant there was such a slogan that customers are provided with metal spoon fork and knife except for Roma people who are provided with plastic fork, knife and spoon. Such treatment of potential customers by a local restaurant is an example of direct discrimination and of course it should be combatted.

Of course always when we talk about discrimination, we start to consider whether there are some situation when we can justify the differentiated treatment. To put it clearly when we can ask for somebody who is of certain ethnic origin or racial origin and we are not interested just in anybody but just interested specifically in the person having such racial or ethnic origin. Such situations in the modern world are really rare. You can be a lawyer, banker, insurance agent, shop assistant, you can be a lecturer at the university, you can be a sailor, shipman and your colour of skin does not count. But if you are going to play in a movie and this movie concerns, for example, the Warsaw uprising of 1944 then it is quite expected that people who play in this movie would have white colour of skin because except for one man there was no black men fighting in the Warsaw uprising in 1944. Such situations, when for example the movie maker is recruiting people who assist or are in the background. In a movie then these are such specific situations when

colour of skin may count and should be taken into account in the process of recruiting.

As described in module 1, The Race Directive provides the most comprehensive levels of protection from discrimination of any of the grounds of discrimination, including gender. It prohibits discrimination in employment, vocational training, social protection including social security and healthcare, social advantages, education, and access to and supply of goods and services including housing.

There are two restrictions on its scope of application. Firstly, in relation to access to and supply of goods and services, it only applies to such goods and services that are available to the public. It would not therefore apply to a landlord's decision to rent their house to a White friend without any public advertisement of that house being for rent. The purpose of this qualification is to further people's right to privacy in matters that are considered to be within private life. This is consistent with the right to privacy under Article 8 of the European Convention of Human Rights.

Secondly, although the Race Directive applies to nationals of third countries, it does not apply to differences of treatment based on nationality and is without prejudice to provisions governing the entry, residence and employment of third country nationals. This is intended to ensure that Member States retain control of their immigration policies.

Racial or ethnic origin are not defined in the Race Directive but should be interpreted broadly and may include related concepts of national origins, descent, colour, and language.

There has to date only been one preliminary ruling decision before the Court of Justice of the EU relating to racial or ethnic discrimination. The case examined the circumstances in which a claim of racial discrimination can be established where public statements are made but there is no identifiable complainant.

Case study: Establishing race discrimination where no claimant is identified

Feryn NV Case C-54/07

The case examined the circumstances in which a claim of racial discrimination can be established where public statements are made but there is no identifiable complainant.

Facts:
The Belgian Centre for Equal Opportunities and Combating Racism brought a case against the firm Feryn NV which installed doors on garages of houses. One of directors of the firm made a public remark that the firm will not employ "immigrants". There was no identifiable complainant in the case as no individual had made a complaint about the statement.

Findings of the Court:
The court found that public statements made by an employer may dissuade certain candidates from submitting their applications, and thus hinder their access to labour market. As a result such a statement was direct racial discrimination.
In terms of the burden of proof, the public statement was sufficient to lead to the presumption that the employer has a recruitment policy which is directly discriminatory and it was then for the employer to prove that there was no discrimination.

Implications:
There does not need to be an identifiable complainant for a claim of direct racial discrimination to be established. Public statements refusing to employ persons of certain racial or ethnic origins will be sufficient to prove racial discrimination.

Please also refer to the case study of Accept C-81/12 in module 5 on sexual orientation discrimination".

You may access previous seminar papers on this subject matter here.

Module 4:
The protected grounds of religion or belief

This module examines the protection from discrimination on the grounds of religion or belief.

An overview of the issues raised in this module is provided by Mr Adam Bodnar which highlights key issues relating discrimination on grounds of race, religion or belief and sexual orientation.

Transcript of the Video:
When we come to the other grounds of discrimination, religion or belief, here we can say that the prohibition of discrimination due to religion or belief is covered by Directive 2000/78/EC, which means it is only applicable to employment related situations; being employed in a firm, questions of recruitment, selection, access to certain positions, possibility to participate in training but also when there are some firms that provide some counselling services concerning the employment market they should also not discriminate due to religion or belief. Also membership in trade unions in professional organisations cannot be restricted because of religion or belief.

With respect to the notion religion or belief also here the Directive is quite open in categorising different situations as a ground for discrimination. We shouldn't think here that only some established religion, that only some registered churches come under the umbrella of this notion. Belief may also be of non-religious character. I can believe in certain ideas and can be discriminated because of that. I can be atheist and be discriminated because of my atheism. Once again this notion is pretty broad but one should remember that the scope of applicability is restricted here only to those employment and professional related circumstances. According to the different reports prepared by the European Commission on discrimination due to religion or belief in the place of employment happens usually in the context of some health and safety regulations, in the context of some requirements established by employers. For example, such polices as dress codes at firms usually come into conflict with the freedom of religion because there might be a problem with ladies who want to wear headscarf or people who want to place their religious symbols at the forefront of their clothes.

We can also have situations when religion or belief comes into conflict with, for example, religious holidays and the general operation of the company or of a certain business. One of leading cases, dating back to the 70s, Prais v Council (C-130/75) concerned the organisation of the examination for the position of the translator in the Council of the European Union, at that moment when there was the start of the Pentecost and Miss Prais could not participate in this completion because she could not on this particular date travel or go outside of her home. So this case illustrates what kind of conflicts may appear between on the one hand freedom of religion, on the other hand some general requirement of the employer. That sometimes the religion needs certain accommodation by the employer and vice versa that sometimes the requirements of the employer might become more important than some individual religious circumstances.

Currently there are very interesting cases pending before the European Court of Human Rights concerning this specific aspect. These cases emerged from the judgements given by different United Kingdom courts and the concerning such issues like whether the person who is of catholic religion may be exempted from participating in ceremonies awarding the civil registered partnership to same sex couples. There was one civil statues officer who did not want to participate in such ceremonies because of his belief in God. Or they may concern such situations whether someone who is employed in some family counselling company should be requested to advice bisexual, gay or lesbian couples in their family or private life problems. We have also cases before the Strasbourg Court concerning whether the employee of British Airways should be compelled not to show their crucifix. Whether any religious symbols should be hidden under their clothes or whether this crucifix could be placed somewhere on the forefront of our clothes. Such issues appear in the domestic discourse, in the domestic discussions, domestics courts and are later on the subject of discussions by international courts and on the basis of those individual conflicts which are sometimes very important to some people, to people who have really strong belief in certain ideas or in certain religions all those problems result in shaping the modern case law cornering the intersection between religion and the place of employment.

Under the Framework Directive protection from religious discrimination is only prohibited in relation to employment, occupations, vocational training and related fields. Unlike racial discrimination, religious discrimination is not prohibited in the sectors of the provision of goods and services, education and housing. However it is important to note that many Member States have gone beyond the minimum requirements of the Framework Directive in their national laws.

There is no definition or religion or belief in the Framework Directive. However in relation to the Article 9 right to freedom of religion under the European Convention of Human Rights, the case law of the European Court of Human Rights has developed principles as to what sorts of religions and beliefs would be protected.

‘Religion’ means any religion and includes a lack of religion. The term 'religion' includes the more commonly recognised religions such as Buddhism, Christianity, Hinduism, Islam, Jainism, Judaism, Rastafarianism, Sikhism and Zoroastrianism. A religion need not be mainstream or well known to gain protection as a religion. However, it must have a clear structure and belief system.

‘Belief’ means any religious or philosophical belief and includes a lack of belief such as Humanism or Atheism.

It is important to note that, unlike the other grounds, there is a specific exception for occupation requirements relating to religious establishments. Article 4(2) of the Framework Directive provides for this exception in relation to occupational activities in churches and other public or private organisations with a religious ethos. It states that:

- a difference of treatment based on a person's religion or belief will not constitute discrimination where;
- by reason of the nature of the activities or context in which they are carried out;
- a person's religion or belief constitute a genuine, legitimate and justified occupational requirement.

The exception is similar to the general genuine occupational requirement under Article 4(1) of the Framework Directive which applies to all the protected groups. However, it specifically states that the exception cannot be used to justify discrimination on other grounds. So for example the exception could not be used to justify discrimination on grounds of gender or sexual orientation which can often arise the in the context of religion or belief.

There is also a relationship between the religious discrimination provisions of the Framework Directive and Articles 9 and 14 of the European Convention of Human Rights. Article 9 provides everyone with the absolute right to hold a particular religion or belief. They also have the right to manifest that religion or belief, unless it is necessary to limit that right for example to protect the rights of others or for health and safety reasons. Article 14 provides for the right to be free from discrimination in the enjoyment of the rights in the ECHR, and this includes discrimination on grounds of religion.

Example:
An employer has a 'no headwear' policy for its staff. Unless this policy can be objectively justified, this will be indirect discrimination against Sikh men who wear the turban, Muslim women who wear a headscarf and observant Jewish men who wear a skullcap as manifestations of their religion.
To date there has been no case before the CJEU examining issues relating to religious discrimination. However, there have been a large number of cases before national courts, as well as cases before the European Court of Human Rights examining related Article 9 issues.

For an in depth examination of issues and cases relating to religion or belief discrimination and Article 9 issues please see the report of the Equinet Network of European Equality Bodies:

Equinet Report: A question of faith, religion and belief in Europe

You may access previous seminar papers on this subject matter here.

Module 5:
The protected grounds of sexual orientation

Introduction

This module examines the protection from discrimination on the grounds of sexual orientation.

An overview of the issues raised in this module is provided by Mr Adam Bodnar which highlights key issues relating discrimination on grounds of race, religion or belief and sexual orientation.

Transcript of the Video:
Another field of applicability of the Directives is sexual orientation discrimination. Sexual orientation is protected only in those fields related to employment and professional life-membership in trade unions or professional organisation or provision of some service as regard the employment. So other spheres of our social life where the sexual orientation may become a ground of discrimination are not covered by the Directive. To put it shortly, when we have a gay couple who want to hire a hotel room and the owner of the hotel room refuses them to have access to such hotel room because he says he will not allow for such things to happen in his hotel, such a situation would not be covered by the Directives because it would be access to good and services which are publicly offered and such situations with this specific ground of discrimination, which is sexual orientation, they are not covered by the Directive. It does not mean that such a situation will not be covered by domestic legislation because we might have a domestic law which goes further than the Directive requires but as such the Directive currently does not cover such situations and is only limited to the employment field.

Usually the Directive is applicable when people are dismissed from their workplace due to sexual orientation or when someone makes jokes concerning gays or lesbians knowing that one of his colleagues from work is gay or lesbian, when someone is not promoted due to his or her sexual orientation, when there are some specific clubs created by the employees of the firm and, for example gays are not admitted to those clubs. There is an interesting example of the sexual orientation discrimination case, a case brought by the ACCEPT organisation to the court in Bucharest and the court in Bucharest decided to make a preliminary reference to the European Court of Justice. The case concerned the statement made by the owner of the Steaua Bucharest football club, in which the owner of the club stated that under no conditions whatsoever he will not employ any homosexual football player, that in his opinion it is contrary to God, that he may risk different things with his company, with his Steaua Bucharest but he will never employ a homosexual in the football club. Such a statement is regarded as direct discrimination.
There are two leading cases of the European Court of Justice concerning the sexual orientation discrimination. The first case Tadao Maruko (C-267-06) was decided on 1 April 2008. The second case Römer v the city of Hamburg (C-147/08) was decided on 10 May 2011. Those cases concern situations when people live in their

registered partnership and there are certain social consequences of living in such registered partnerships.

In the case of Mr Tadao Maruko, Mr Tadao Maruko had a life long partner. His partner was a designer of costumes in German theatres. He died. Mr Tadao Maruko wanted to enjoy the widow pension which was sponsored by the German theatres, a special pension fund. So basically his partner for a number of years saved money in this German theatre pension fund and Mr Tadao Maruko wanted to take advantage of this situation. So like a traditional situation: we have a couple one of the partners is the surviving partner so he is taking advantage of some additional retirement scheme. According to the rules which were binding in the German pension fund for theatres, it was possible to inherit or to get such a widow pension only in a situation when you were in a marriage not in a situation where you were a partner, registered under the same sex partner regime. Mr Tadao Maruko decided to challenge this regulation and the domestic court decided to make a preliminary question to the European Court of Justice. The European Court of Justice stated that such a situation may be regarded as direct discrimination because it is a differentiated treatment of surviving married partners versus surviving partners in registered partnership. But basically the European Court of Justice requested the domestic court to consider whether there are any substantial reasons behind the differentiated treatment here of marriages and registered partnership. Basically the court referred the case back to the domestic courts saying ‘ok dear German courts please consider right now are their any justifiable grounds on the basis of which you can differentiate in the case of inheriting the widower's pension between married partner and registered partner’. As far as I know the German courts did not find such reasons and ultimately Mr. Tadao Maruko got the pension after his deceased partner.

Another case, the case of Mr Römer v the city of Hamburg is much more complicated. Mr Römer was living in a stable relationship with his partner. In 2001 when the Lebenspartnerschaftsgesetz, the German law on registered partnership entered into force, Mr Römer decided to make a registered partnership with his partner. Later on he retired and he started to get additional supplementary bonuses from the city of Hamburg as a part of this pension. He claimed that his special bonus is taxed according to a regulation which should not be applicable in his particular situation. He basically claimed that he should be taxed in the same way as married partners. Once again the court in Hamburg decided to refer the case to the European Court of Justice and the European Court of Justice responded that it is once again the task for the national court to determine whether there are any compelling reasons behind differentiated treatment of same sex couples living in registered partnership and married partners who just concluded an ordinary marriage. The case is quite interesting because it is not a dispute concerning one euro but the difference in treatment is 300 euro. At the same time, when you compare the registered partnership and marriage you can see that maybe there are some different types of obligations of partner towards each other: usually in marriage there are children or some other duties to care than in a typical registered partnership.

It is a duty for the domestic courts right now to consider how we should treat these situations. But those cases, Tadao Maruko and Römer are important because

of two reasons. First, they show that the European Court of Justice will come into assessment of different situations concerning same sex couple in those countries which adopted same sex couples legislation, so they have same sex registered partnership or marriages. On the other hand, this case will not be applicable to such countries, for example Poland which has no legislation whatsoever. Second, this case shows that in those situations where people live together and one of the partner is employed it is a potential huge scope for the development of the case law of the European Court of Justice under the Directive 2000/78/EC. So one may expect some new cases appearing here in the jurisprudence of the European Court of Justice. But in general when we look into the sexual orientation discrimination right now we can see that those standards tend to emerge both in the Luxembourg Court and the Strasbourg Court. There is a long line of interesting judgments concerning the sexual orientation discrimination. One of the most interesting cases is Karner v Austria (ECHR 24-7-2003) as well as Kozak v Poland (ECHR 2-3-2010), which concerns the situation of stepping into the lease agreement after the deceased homosexual partner. The ECHR, the Strasbourg Court, quite clearly decided that the lack of such possibility to inherit the house after the deceased partner may be regarded as discrimination under the European Convention of Human Rights and may be regarded as a violation of their private life. But still we have to wait for judgments concerning the recognition of same sex couples rights or there are some case pending which concerns the possibility to adopt children by same sex couples.

Thank you very much.

Under the Framework Directive protection from sexual orientation discrimination is only prohibited in relation to employment, occupations, vocational training and related fields. Unlike racial discrimination, sexual orientation discrimination is not prohibited in the sectors of the provision of goods and services, education and housing. However, it is important to note that many Member States have gone beyond the minimum requirements of the Framework Directive in their national laws.

It is also important to note that the Framework Directive states that it is without prejudice to national laws on marital status and the benefits dependent on such status (recital 22). This means that the Directive does not affect the national laws of Member States as to whether gay men or women can marry or form some other partnership similar to marriage. This has implications for the types of the cases that have been before the CJEU in relation to sexual orientation (see below).

There is no definition of sexual orientation in the Framework Directive. However, in general terms it means a person's sexual orientation towards:

- persons of the same sex (that is, the person is a gay man or a lesbian);
- persons of the opposite sex (that is, the person is heterosexual); or
- persons of either sex (that is, the person is bisexual).

Discrimination on grounds of sexual orientation would cover all types of sexual orientation. Gender reassignment discrimination is not the same as sexual orientation discrimination and is covered separately by the Gender Directives.

There is also a relationship between the sexual orientation provisions of the Framework Directive and Articles 8 and 14 of the European Convention of Human Rights. Article 8 provides a right to privacy and a right to family life. Both of these rights apply in relation to sexual orientation.

The right to privacy and family life, can be limited, but only where it is necessary to do so, for example to protect the rights of others, national security or to prevent crime. Article 14 provides for the right to be free from discrimination in the enjoyment of the rights in the ECHR, and this includes discrimination on grounds of sexual orientation. There have been a number of cases before the European Court of Human Rights that have examined issues relating to these rights and sexual orientation.

Sexual orientation discrimination cases under the Framework Directive apply not only in relation to the way in which a person is treated in a work environment because of their sexual orientation, but also to the benefits and pensions linked to employment.
The two cases to date before the CJEU to consider sexual orientation discrimination have both involved pensions.

Case study: Discrimination on grounds of sexual orientation in relation to employment pensions

Maruko C-267/06, 1 April 2008

Facts:
In 2001 Mr Maruko entered into a life partnership with his partner, comparable to a marriage as the German law permitted such partnerships. In 2005 Maruko's partner died.
Maruko applied for a widower's pension but his application was rejected on grounds that the regulations did not provide for such an entitlement for surviving life partners. At issue was whether such treatment was direct or indirect sexual orientation discrimination under the Framework Directive.

Findings of the court:
A survivor's benefit under an occupational pension scheme is "pay" within the meaning of Article 141 of the TEU and Article 3(1)(a) of Directive and as a result within the scope of the Directive.
Recital 22 (which states that the Directive is without prejudice to national laws on martial status and the dependent benefits) does not mean survivor's benefits are outside scope of Directive.
If the national court finds that surviving spouses and surviving life partners are "in a comparable situation so far as concerns that survivor's benefit", legislation that does not provide the same benefit is direct discrimination on grounds of sexual orientation.

Implications:
The decision is of importance to any Member State where the government has provided gay partners the right to marry or to form some other type of partnership similar to marriage. If heterosexual and homosexual couples are in comparable situations, Member States will need to ensure they do not discriminate between the rights and benefits provided to the heterosexual and homosexual couples.

Romer C-147/08, 10 May 2011

Facts:
Mr Romer worked as an employee of a local authority in Germany. On retirement he claimed under an occupational pension scheme for a supplementary retirement pension.
Mr Romer entered into a registered partnership in 2001 and requested a re-calculation of the pension from that period. The method of calculating that pension was favouring married recipients over those living in a registered life partnership. The issue was whether this was direct or indirect sexual orientation discrimination under the Framework Directive.

Findings of the court:
The pension was pay and therefore within the scope of the Framework Directive.
The court applied the Maruko case and decided that although it is for Member States to decide whether or not to provide similar rights for same sex couples to

married couples, if a State does provide similar rights, there can not be discrimination on grounds of sexual orientation unless justified. The difference in pension amounts was direct sexual orientation discrimination.
The court also held that there was no need to find that married couples and same sex couples are in identical situations, it was sufficient that they are in "comparable" situations for direct discrimination.

Implications:
The decision has similar implications to the Maruko decision.

Case study: Discrimination on grounds of sexual orientation in relation to benefits

Hay C-267/12, 12 December 2014

Facts:
Mr Hay worked for one of the French financial institutions. In July 2007, he entered into a registered partnership under the French law (PACS) with a male partner. On that occasion he applied (according to the collective agreement) for days of special leave and a marriage bonus provided by the employer to the employees who got married. The employer refused to grant Mr Hay the benefits in question and based the decision on the relevant provisions of the collective agreement which limited the benefits to marriages only. The issue was whether limitation of the possibility to conclude marriages only for different-sex couples could constitute an appropriate, legitimate and necessary aim to justify an indirect discrimination which is a result of the collective agreement.

Findings of the court:
The Court ruled in favour of Mr Hay and found direct discrimination based on sexual orientation and stated that the fact that the PACS are open for both homosexual and heterosexual couples (unlike in cases of Maruko and Romer) is irrelevant and does not change the nature of the discrimination of homosexual couples who did not have access to full marriage at the time of the proceeding of the case. In terms of the issue of comparability the Court, different from Maruko and Romer, itself assessed this issue and stated that the employees who are entering PACS are in a comparable situation to those who are entering marriage – which is also a civil union.

Implications:
The Court set a high standard of protection against sexual orientation discrimination in employment by putting those homosexual employees who are entering civil unions and do not enjoy the possibility to conclude full marriage in a comparable situation with those who have this right.

Dittrich, Klinke, Müller, C-124/11, C-125/11 and C-143/11, 6 December 2012

Facts:
Two of the applicants were federal public servants and one was a retired federal public servant. All of them unsuccessfully lodged applications with the Bundesrepublik Deutschland for assistance for medical expenses incurred by their respective civil partners (partnerships were concluded under the German registered partnership law). All of them were denied to be granted the assistance due to the fact that the personal scope of the law regulating the conditions of the benefits in question does not include (contrary to spouses) civil partners.

Findings of the court:
The Court ruled in favour of the complainants and stated that a financial benefit, such as the assistance granted to German federal public servants in the event of illness, under which a certain amount of health care expenses incurred by the

public servant or certain members of his family are covered comes within the concept of 'pay'. The Court stated that the benefit was granted to the worker by reason of his employment relationship and this implies protection against discrimination laid down by the Directive 2000/78/EC.

Implications:
The Court underlined that the employment benefits as those in question (assistance in case of illness) if regulated by law should be deemed as a component of pay (salary) not as a part of social security budget which is exempted from the material scope of the Directive. The benefit is provided by the State which acts in this case as an employer. However, it is for the national court to determine whether that is indeed the case.

Case study: Discrimination on grounds of sexual orientation in recruitment conditions

Accept C-81/12, 25 April 2013

Facts:
The applicant was a non-governmental organisation (NGO) that promoted lesbian, gay, bisexual and transsexual rights in Romania. It lodged a complaint to the National Council for Combating Discrimination against Mr Becali who was a shareholder in a football club and made public statements that the club would not hire a homosexual player.
The National Council for Combating Discrimination held that the proceedings did not fall within the scope of an employment relationship as the statements were not from the employer football club, its legal representative or a person responsible for recruitment.

Findings of the court:
The court made a number of findings.
Firstly, it held in applying the Feryn case C-54/07, that in cases of direct discrimination it is not necessary for an identifiable complainant. Complaints of discrimination can be brought by organisations such as NGOs.
Secondly, it held that in relation to the burden of proof, in order to prove "facts from which it may be presumed" that direct sexual orientation discrimination occurred, it was not always necessary to establish that the person making discriminatory comments had direct legal capacity to bind or represent the employer in recruitment matters. Relevant factors in this case were that the football club had taken no steps to clearly distance itself from the statements; and the perception that the public would have of the statements.
Finally, in relation to possible remedies, the court held that where a national court or tribunal can only impose warnings and not damages or other remedies which would render the sanctions effective, proportionate and dissuasive, those remedies will not be compliant with the Directive. However, it is for the national courts to make the determination on this point.

Implications:
The case highlights that employers are likely to be liable for statements by individuals where those persons are perceived as representing the employer, notwithstanding that the individuals do not actually have legal capacity to bind the employer.

Module 6:
The protected grounds of disability

Introduction

This module examines in more detail protection from discrimination on the grounds of disability.

An overview of the issues raised in this module is provided by Ms Mary Stacey which highlights key issues relating discrimination on grounds of disability.

Transcript of the Video:
I am delighted to be here today to talk about the disability strand of the legal protection conferred in the EU by principally Directive 2000/78/EC.

The disability strand I think is particularly exciting for number of reasons. Firstly, the protection from discrimination of disabled people is a relatively recent phenomenon and we are moving away from paternalism, pity and sympathy for the disabled to the granting of substantive rights and equal treatment and the recognition of disabled people's equal worth in society and their entitlement to full participation and inclusion in society. Secondly, there are particular issues thrown up in the field of disability discrimination because a formal approach to equality, to say that we must treat everybody the same, is not sufficient to provide protection for disabled people because by definition they are differently abled and are unable to do some of the things that people without disability can do and are not able to participate in quite the same way. So a very formal approach to equality will not confer substantive rights on disabled people.

I think it's also worth reminding ourselves how many people in the EU, across the EU are disabled. Disabled people represent 80 million persons in the European Union. That's more than 15% of the population. It is the equivalent of the population of Belgium, Czech Republic, Greece, Hungary and the Netherlands all together. One in four Europeans has a family member with a disability and six Europeans out of 10 know someone in close or more distant circles who has a disability. It is also a salutary reminder to look at the extent to which disabled people are excluded from the labour market and the more severe the degree of disability the lower the participation in the labour force. Only 20 per cent of people with severe disabilities compared with 68% for those without disabilities. People with disabilities are less likely than more than 50% to reach tertiary education compared to non-disabled people. 38% of disabled young people that is the age of 16-34 across Europe haven't earned income compared to 64% of non-disabled people. And the statistics are pretty constant in each Member State. In the United Kingdom, for example, the statistics exactly mirror those across the wider EU.

What I am going to do today is to talk about some of the special features in the area of disability. I am going to talk about the United Nation Convention on the Rights for Persons with Disabilities. I am going to next talk about the definition of disability. Then I am going to talk about the duty of reasonable accommodation

which is a specific right available only in the disability strand under the Directive. And then finally, I am going to talk abut some of the ECHR, that is the European Court of Human Rights' case law.

The legal framework provided in Council Directive 2000/78/EC includes the prohibition against disability discrimination in its scope, and the concept of discrimination and the principle of equal treatment that's set out in Article 2 applies to disability as much as it does in relation to all other strands, such as sex, sexual orientation, race, religion and belief. So too do the provisions concerning the burden of proof and victimisation. They apply equally to the disability strand but what I am going to concentrate on are the areas that are special to disability.

The United Nations Convention on the Right of Persons with Disabilities has a particular and special status within EU law and that is because this United Nations Convention has been adopted by the European Union itself. On 23 December 2010 the EU for the first time in its history became a party of itself to an international human rights treaty. Now what that means is the implication of ratification by the EU itself is that it must be read into Article 4 of the Council Directive by the EU organs including the CJEU, the Court of Justice of the European Union, and indeed all national courts in interpreting European law must seek consistency with the Directive 2000/78/EC and the UN Convention. So it brings the UN Convention right into the heart of EU law itself and is something that is to be relied on and used as an aid to interpretation amongst all nation states of the EU. And what the Convention does in addition to the Directive, which we will talk about in a moment, is its purpose to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities across a very wide scope of civic life. It covers voting rights, independent living, standards of living, social protection and indeed mobility. It is far wider then just work, and occupation and employment.

Although the focus of my talk today is on work and employment it is important to know that the UN Convention in fact goes wider than that. And it does two important things: It requires state parties to consult with and actively involve persons with disabilities in developing and implementing legislation and policies to implement the Convention and that seen as important of itself because it both empowers disabled people in the formulation of policies which affect them but furthermore, it increases the chance of ensuring that effective measures are introduced and the Convention places particular emphasis on issues of legal capacity, and the immediate and pressing need to protect persons with disabilities from violence and abuse where all the research shows that they are a particular vulnerable group to hate crime attacks. So what it also means is we have to look at the rights conferred by Directive 2000/78/EC through the prism and with the aid of interpretation of the United Nations Convention and we can get used to the Convention being referred to us by advocates in national courts at hearings throughout the EU.

Now next I want to talk a bit about the concept of disability. Because it is acknowledged that disabled people are less able to participate on account of their disabilities in the full range of life and the activities that those without disabilities are lucky enough to enjoy. Disability rights are asymmetrical and they provide

protection for disabled people and in certain circumstances will introduce the right to a reasonable accommodation and adaptations for people who are disabled. So therefore it goes beyond equal treatment of treating everyone the same but making particular provision for people who are disabled. Now what that means is that the definition of disability, who meets that test and who doesn't become absolutely crucial in understanding how far the scope of the right extends and who accesses it. So it is not surprising that one of the first cases on the disability strand referred to the CJEU concerned the scope of the definition. That was the case of Chacón Navas (C-13/05) a Spanish case, because the Directive itself does not define the term disability. Miss Chacón Navas was certified as unfit for work on grounds of sickness and was not in the position to return to work in the short term. She was then dismissed solely on grounds of sickness and the question which the Spanish court referred to the European court was whether dismissal solely on the ground of sickness amounted to disability discrimination and, if it didn't, whether sickness should be introduced as an additional strand, an additional characteristic to be added to those in Article 1 requiring protection from discrimination. And what the European Court held was this: that the concept of disability must be given an autonomous and uniform meaning across the EU and it has a number of component parts. It must be understood as referring to a limitation which results in particular from a physical, mental or psychological impairment and that impairment must hinder the participation of the person concerned in professional life and that the limitation must be likely to last for a long time. What it said was that the meaning must be autonomous and uniform across the EU and is an EU wide definition. So applying that to the facts of the Chacón Navas case they said there is a distinction therefore between sickness and disability. The two concepts are not necessarily the same and there is no protection of itself from discrimination on grounds of sickness, but sickness may result in or amount to disability or it may overtime become a disability in accordance with the definition.

Now interestingly the UN Convention on the Rights of Persons with Disabilities provides a more expansive definition. It includes the concept that there must be an impairment, which must be physical, mental, intellectual or sensory. It must be long-term and it must hinder the person's full and effective participation in society on an equal basis with others. But it introduces the following words in the definition, which describes the impairments 'in interaction with various barriers'. So in other words the UN Convention definition looks at the medical model, the physical, mental, intellectual impairment, but then combines that with a social model by looking at the interaction with various barriers which may then hinder the effective participation of the individual concerned. In other words it focuses attention on the barriers created by society in the way that we organise work patterns, by the physical features of the environment, the office steps, the background auditory noise for example and sees them as part of the problem instead of it being the individual's problem.

There is a leading disability rights campaigner in the UK, who is a wheel chair user and she describes going to the supermarket and seeing that the particular brand of cornflakes that she wants are on the top shelf. The supermarket manager sees her looking a bit perplexed, looking at the row of the shelves of food and patronisingly ruffles her hair and says 'what's the matter with you dear' and she says 'the matter with me is that the cornflakes are over there' pointing to the top shelf

where she clearly can't reach them and it seems to be a very telling example that it is not the person's fault, it's the way we organise the things around people that is often the problem and the interest amongst disability rights campaigners is the way in which the UN Convention now includes a reference to the social aspect, the interaction with various barriers in the definition of disability itself and there are two pending cases before the CJEU, where the full scope of the definition of disability is likely to be tested. The first one is Bundesrepulik Deutschland v Karen Dittrich (C-124/11), where the question arises of whether in the case of illness, whether illness is covered by the definition of disability, where national legislation on that ground of assistance of public servants is granted in cases of illness but not otherwise. And the second case is Jette Ring (Case C-335/11), a Danish case which is looking at incurable illnesses, whether they amount to disability and whether conditions caused by a medically diagnosed temporary illness amount to a disability and thirdly, whether there is a reduction in functional capacity that does not require any auxiliary aid, whether that is sufficient to meet the test of disability and what it will be interesting to see is the extent to which the UN Convention definition will be used in the Court of Justice to inform and understand the definition of disability.

Now next I want to talk about the reasonable accommodation duty itself. As I've said an important aspect of providing rights for disabled people in law includes the right in certain circumstances to reasonable accommodation and it provides for different and special treatment of disabled people so they can fully participate in society. Now this right finds form in Article 5 of Directive 2000/78/EC and provides that in order to guarantee compliance with the principle of equal treatment in relation to persons with disability reasonable accommodation shall be provided and it requires employer to take appropriate measures where needed in a particular case to enable a person with the disability to have access to, participate in or advance in employment or to undergo training and that will be required unless such measures would impose a disproportionate burden on the employer. So therefore if the employee or the person who is seeking employment shows that he or she is hindered in participation in the workplace the employer must show that they have complied with this reasonable accommodation duty unless the burden of doing so is disproportionate.

Now there is considerable overlap between the reasonable accommodation duty and the general duty of indirect discrimination and both apply in the field of disability discrimination but the interesting feature of the reasonable accommodation duty is that it provides individual rights and requires individual accommodation specific to the particular circumstances of the disabled employee so that the employer must consider how the problem can be overcome. So, for example, if it requires the installation of a ramp to enable a disabled person, who is a wheelchair user, access to the office, then they must make that adjustment, that accommodation for that individual, unless to do so would be disproportionate. So therefore it looks at specific cases, whereas indirect discrimination will look at the wider issues of anyone who might be thinking of applying to a workplace or anyone who might be an employee and is said to be a right at large rather than specific. Now surprisingly there has yet been no CJEU case law on the scope of the reasonable accommodation duty. But there are two cases pending. The first one is infringement proceedings brought by the Commission against the Italian Republic,

which seeks a declaration that by not placing all employers under an obligation to make reasonable accommodation for all disabled people, the Commission wants a declaration, that the Italian Republic has failed to implement Directive 2000/78/EC correctly and if that case is successful, which I think it's very much likely to be, then that will really strengthen and reinforce the importance of the right. The second pending case is the case of Jette Ring v DAB (Case C-335/11) , which I have mentioned earlier in the context of disability and that asks the question whether a reduction in working hours is among the measures covered by Article 5. In other words if a disabled person because of their disability is unable to work full time would it be a reasonable accommodation to reduce the hours of that individual and the questions posed in that case also include the question of whether someone has been dismissed following a failure by an employer to make a reasonable accommodation. What is the position where the dismissal has been caused by that failure and can you then take into account the fact that there has been a failure to make a reasonable accommodation in considering the legality of the dismissal itself. So watch this space for more case law, or some case law on the scope of the reasonable accommodation duty and again it will be interesting to see how the UN Convention on the Rights for Persons with Disabilities will be preyed in aid and used to inform the debate before the CJEU because the UN Convention defines the failure to make reasonable accommodation as a form of discrimination itself in its own right and therefore further elevates the status of this important part of the protection provided by the Directive.

Now finally I want to talk a bit about the recent case law form the European Court of Human Rights in this area because there have been some interesting developments and increasingly. Not only because of the UN Convention that as I say has to be read into EU law now on account of the Convention having been ratified by the EU itself, but also the general trend in the case law of the CJEU and the ECHR to refer to each others' judgement and to build a comprehensive set of rights that complement each other, it's worth looking at three cases that the European Court of Human Rights has recently considered in the context of disability.

The first one is Glor v Switzerland (ECHR 30-4-2009) where Sven Glor was found by the European Court of Human Rights to be protected on account of his diabetes under Article 14 and the exercise of his private life under Article 8. His diabetes deemed him medically unfit for military service yet not severely enough to relieve him from paying a military service exemption tax which was a pretty significant amount over several years and the European Court of Human Rights, ECHR I will refer to it as, found that there had been a violation of his Convention rights and using and relying on the UN Convention of the Rights for Persons with Disabilities was very critical of the Swiss government for failing to provide a reasonable accommodation to Mr. Glor's individual circumstances.

The ECHR then built further on the Glor decision in its 2010 judgment of Alajos Kiss v Hungary (ECHR 20-5-2010) and in that case the applicant had manic depression and for that reason was placed under partial guardianship and under the Hungarian Constitution there was a blanket ban, which prohibited him, an absolute ban violated his right to vote in elections because of this being under partial guardianship and the European Court said it breached the ECHR Convention again

relying on the UN Convention for the Rights of Persons with Disabilities because it failed to take an individual judicial evaluation of the extent to which Mr Kiss was impaired in his ability to vote.

The third and the last case I am going to mention is a case brought against Russia by Mr Kiyutin (ECHR 10-3-2011) and this is a particularly fascinating case because Mr Kiyutin was HIV positive and on account of being HIV positive he was denied Russian residency for which he would otherwise have been eligible. Mr Kiyutin was a Uzbek national but has a Russian wife and a child in Russia and he's lived there for some time but as part of his application for residency was required to take a HIV test which is not a test that would have otherwise been applied to him and it was found that he tested positive. And what the European Court of Human Rights said was that they were entitled to take account of the stigma surrounding HIV status in reaching a conclusion that it violated his rights of Article 8 and Article 14 and readily accepted that the ignorance about how the HIV disease spreads bred prejudices which in turn stigmatised and marginalised those who carried the virus and it reinforced other forms of stigma such as racism, homophobia and misogyny. So it is interesting that the court was very willing to engage in an understanding and analysis of the social side of disability and the prejudice that Mr Kiyutin was exposed to went beyond the mere medical test of HIV because it took account of the social stigma attached to that condition as well, which again I think was partly in light of the UN Convention on the Rights of Persons with Disabilities definition of disability and allowing them to take that expansive model.

So where we've come to then, in the short space of time, it's only since 2006 that rights for disabled people were fully enforceable under Directive 2000/78/EC and just this five and a half years we can see disability rights have become a long way and have further been strengthened by the UN Convention and the appetite for both the CJEU and the European Court of Human Rights to take disability rights seriously and to interpret them in way that will entitle disabled people to full participation where possible in the fields of work, employment and occupation and indeed beyond, which is beyond the scope of this talk. So thank you every much indeed for listening to me and it's been a pleasure to address you today. Thank you.

Under the Framework Directive protection from disability discrimination is only prohibited in relation to employment, occupations, vocational training and related fields. Unlike racial discrimination, disability discrimination is not prohibited in the sectors of the provision of goods and services, education and housing. However, it is important to note that many Member States have gone beyond the minimum requirements of the Framework Directive in their national laws.

There are three aspects of disability discrimination examined in this module:

- the implications of the EU ratifying the United Nations Convention on the Rights of Disabled Persons;
- the extent of protection relating to disability under the Framework Directive;
- the requirement to make reasonable accommodation under the Framework Directive.

The United Nations Convention on the Rights of Persons with Disabilities

As described in module 1, the EU ratified the CRPD in December 2010 and this was the first time the EU has ratified any international convention relating to human rights. The CRPD provides disabled persons with comprehensive protection of a wide range of human rights in the fields of civil, political and socio-economic rights. These include rights relating to non-discrimination, freedom from torture or inhumane and degrading treatment, freedom from violence and exploitation, respect privacy, respect for the home and family, education, health, and an adequate standard of living.

In addition the CRPD requires all State Parties to designate one or more focal points to monitor the implementation of the Convention. The EU institutions are still in the process of finalizing which EU bodies will fulfill that role in relation to the EU.

Finally, the Optional Protocol to the Convention provides a mechanism by which State Parties can agree to individuals bringing complaints to the United Nations that their rights under the Convention have been breached. The EU is yet to ratify the Optional Protocol.

You can view the full Convention and its Optional Protocol here.

The effect of ratification is that all the EU institutions (including the European Commission and Court of Justice of the EU) must comply with the CRPD in developing, implementing and interpreting EU law. In practice this means that the EU institutions and Member States must interpret and implement the Framework Directive consistently with the CRPD and its core human rights principles of respect for the dignity of disabled persons; their autonomy, participation and full inclusion in society, and non-discrimination (Article 3 CRPD).

The CRPD will also be relevant in interpreting any of the rights which are particularly relevant to disabled persons in the Charter of Fundamental Right such as the rights to the integrity of the person (Article 3 CFR), the right not be subjected to inhumane and degrading treatment (Article 4 CFR), the right to private and family life (Article 7 CFR) and the right to non-discrimination (Article 2 CFR) and the rights to measures to ensure the integration and participation of disabled persons in society (Article 26 CFR).

The effect of the Convention on the interpretation of the Framework Directive is discussed further below.

The extent of protection relating to disability under the Framework Directive

There are several issues that arise concerning the extent of application of the Framework Directive and have been examined by the Court of Justice of the EU. Firstly, what is the meaning of disability? And secondly, does protection from disability discrimination extend to persons associated with a disabled person, who are not themselves disabled?

Disability is not defined in the Framework Directive. It has, however, been the subject of examination before the CJEU.

Case study: The meaning of disability in the Framework Directive

Chacon Navas C-13/05 11 July 2006

Facts:
Ms Navas worked in catering company and was certified unable to work on grounds of sickness and did not work for 8 months.
She was then dismissed without reasons and brought a claim of unlawful disability discrimination.

Findings of the court:
The concept of disability must be given an "autonomous and uniform interpretation".
It refers to "a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life." The limitation must also be probable to "last for a long time".
The terms disability and sickness are not the same. As a result a person dismissed for reasons of sickness alone does not have protection on grounds of having a disability.

Implications:
The approach to the meaning of disability used a medical rather than a social model of disability. In other words it focused on the physical impairments of the disabled person without consideration of the social barriers in society. This is not consistent with the approach under the UN Convention on the Rights of Disabled Persons but at that time it was not yet in force internationally.

There is a definition of disability under the CRPD which is wide and broader than the approach taken in the Chacon Navas case. **Article 1** provides:

"Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."

The definition contains both reference to the physical or mental impairments of the person, and the social barriers that effect the participation of disabled persons in society.

See also the case study on Ring C-335/11 and Werge C-337/11 as the meaning of disability.

Case study: Disability discrimination by association

The second issue relating to the extent of protection from disability discrimination which has been examined by the CJEU, is whether it extends to discrimination by association. In other words, does protection extend to persons who are not themselves disabled, but are treated less favourably because of the disability of someone they are associated with such as family members, friends or co-workers.

Coleman v Attridge Law C-303/06 3 April 2008

Facts:
Ms Coleman was a legal secretary in a law firm from 2001. In 2002 she gave birth to her son who is disabled. Ms Coleman is his primary carer.
She accepted voluntary redundancy in 2005 and brought a claim of disability discrimination and harassment on grounds of disability. Coleman was represented in her claim by the Equality and Human Rights Commission in Britain. The claim alleged discriminatory acts by her former employers by reason of her association with her disabled son.

Findings of the court:
The wording and intention of the Framework Directive is to prevent all forms of discrimination on grounds of disability, not just against disabled persons. The use of the words "on grounds of disability" in relation to direct discrimination and harassment indicated that the Directive was broad enough to protect discrimination by association.
There was a difference with the provisions on indirect discrimination which refers to provisions, criterion or practices that put or would put "persons with a particular disability" at a disadvantage.

Implications:
The decision has direct implication for all other grounds of protection under the Framework and Race Directives as well as the Gender Directives, as the same principle applies for direct discrimination and harassment on those grounds. In others discrimination by association should apply to all the protected grounds.

The requirement of reasonable accommodation under the Framework Directive

An important aspect of promoting an ensuring equality for disabled persons is the duty to make reasonable accommodation. This exists in addition to the prohibitions on direct and indirect discrimination as well as harassment and is unique to the grounds of disability. The reasonable accommodation duty recognizes that in order to achieve substantive equality for disabled persons, it may be necessary to treat disabled persons differently. In a work environment this may consist of, for example, making adjustments to policies or practices, physical features or by providing auxiliary aids such as extra equipment.

Example:
Clear glass doors at the end of a corridor in a particular workplace present a hazard for a visually impaired job applicant or worker. Adding stick-on signs or other indicators to the doors so that they become more visible is likely to be a reasonable adjustment for the employer to make.

Article 5 of the Framework Directive requires employers to:

- take appropriate measures where needed in a particular case;
- enable disabled persons to have access to, participate in or advance in employment,

unless such measures would impose a disproportionate burden on the employer. Failure to make reasonable accommodation for disabled persons will constitute a form of discrimination under Article 2 of the Framework Directive.

A similar but broader duty is contained in the CRPD. Article 5(3) requires State Parties to take all appropriate steps to ensure that reasonable accommodation is provided for persons with disabilities in order to promote equality and eliminate discrimination. The CRPD also specifically requires that State Parties provide reasonable accommodation in respect to the right to liberty and security of the person, the right to education and the right to work and employment. Reasonable accommodation is defined in Article 2 of the CRPD as follows:

"'Reasonable accommodation' means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms."

The application and coverage of the reasonable accommodation duty is therefore much wider than that of Directive 2000/78 and extends beyond the employment field, but the scope of the duty itself is similar.

You may access previous seminar papers on this subject matter here.

Case study: Meaning of disability and reasonable accommodation

Ring C-335/11 and Werge C-337/11, 11 April 2013

Facts:
Ms Ring was employed by a housing association in Denmark. During a period of over four months from June to November 2005 she took sick leave for constant lumbar pain. Ms Werge was employed as an office assistant for a company Pro Display. In 2003 she was the victim of a road accident and suffered whiplash injuries. She went on full time sick leave from January 2005 to April 2005.
Both Ms Ring and Ms Werge were dismissed by their employers with one month's notice pursuant to a Danish employment law that permitted the dismissal of employees on those terms who took sick leave for a total period of 120 days during a period of 12 consecutive months. This was less than the normal three month notice period for dismissals where a person had been employed for more than six months.
After Ms Ring was dismissed she started a new job working 20 hours a week. After Ms Werge was dismissed she underwent an assessment which concluded she was capable of working for about 8 hours a week. Ms Werge was subsequently granted early retirement on the grounds of her incapacity to work.
Proceedings were brought on behalf of Ms Ring and Ms Werge claiming that both were suffering from a disability and that the employers were required to offer them reduced working hours in compliance with the requirement to make reasonable accommodation for disabled persons under Article 5 of the Framework Directive 2000/78/EC.

Findings of the court:
The United Nations Convention on the Rights of Persons with Disabilities (CRPD) was approved by the European Union on 26 November 2009. As the CRPD is an international agreement concluded by the EU it is binding on all its institutions, and all EU law including the Framework Directive 2000/78/EC must be interpreted as far as possible consistently with the CRPD.

Meaning of disability:
In relation to the meaning of disability, as there is no definition in the Directive, the court applied the CRPD definition to hold that:

- disability refers to a limitation which results from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation in society on an equal basis with others; and
- is long-term.

The court also found that a person who has impairments but is only able to work part-time could be a disabled person.

Reasonable accommodation:
Recital 20 of the Directive contains a non-exhaustive list of what may constitute reasonable accommodation for disabled persons in employment. Reduced working

hours relates to "patterns of working time" as defined in Recital 20 and can constitute a reasonable accommodation.
As a result, national legislation will not be lawful where it permits the dismissal of a disabled employee on one month's notice, the person is absent because of illness related to the disability, and the employee could have been provided reasonable accommodation of reduced working hours.

Direct and indirect disability discrimination:
There was no direct disability discrimination as the policy of terminating persons absent due to sickness applied to all employees.
In relation to indirect disability discrimination, the Danish government's policy did put disabled persons at a particular disadvantage as they were more likely to become sick. The question was whether the policy had a legitimate aim and was proportionate. The policy did serve a legitimate aim of creating a flexible labour market and encouraging recruitment. In relation to proportionality of the policy, there was a need to balance the need of a flexible labour market with the adverse impact the policy would have on disabled person but it was for the national courts to determine this issue.

Implications:
The decision highlights that development in the law on disability discrimination since the Chacon Navas Case C-13/05 which was decided before the CRPD was approved by the EU. The Court directly applied the meanings of disability in the CRPD ensuring consistency in the EU approach and the approach globally.
In relation to reasonable accommodation the decision also emphasised that reduced working hours may be an appropriate accommodation for disabled employees in order that they can continue to work.

Kaltoft C-354/13, 18 December 2014

Facts:
Mr Kaltoft was hired by one of the Danish public administrative authorities as a childminder, to take care of children in his home. He worked for 15 years as a childminder and during this whole period he was 'obese' as defined by the World Health Organization. He gave several tries to lose his weight, also with some support provided by the employer. However, Mr Kaltoft failed to fight his obesity. Shortly before his dismissal the number of children that he was supposed to take care of declined from four to three. This was an official reason of employment termination since he had authorization to carry out his professional activity with regard to four children. Mr Kaltoft was, however, convinced that the real reason was his obesity, since he was the only childminder nominated to be made redundant.

Findings of the court:
The Court underlined that neither TEU nor TFEU contain provisions which explicitly prohibit discrimination on the grounds of obesity as such. Also, there is no single EU secondary law banning such discrimination. However, The Court referred to the United Nations Convention on the Rights of Persons with Disabilities, which the EU is a party of and reminded that the concept of 'disability' must be understood as

referring to a limitation which results in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers. What is important, the Court underlined, is that it should be noted that obesity does not in itself constitute a 'disability' within the meaning of Directive 2000/78. However, in case the obesity causes limitations that are defined by the UN Convention on the Rights of Persons with Disabilities and hinders full and effective participation of that person in professional life on an equal basis with other workers (and the limitation is a long-term one) it might be covered by the term of disability as laid down by the Directive 2000/78/EC.

Implications:
The Court ruled that it is for the national court to decide whether Mr Kaltoft's obesity fulfilled the conditions regulated by the UN Convention and generated all the limitations in his professional life. The Court set a high standard of protection against disability discrimination by recognizing that disability may occur in many forms whenever it is a reason of limitation resulting in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.

Z, C-363/12, 18 March 2014

Facts:
The case was initiated by a female employee who had a child through surrogacy (the birth-mother was a different woman) since she was unable to bear a foetus. According to the Irish anti-discrimination law this kind of health condition is regarded as disability. After the birth of a child by a surrogate mother Mrs Z applied to her employer for paid adoption and maternity leave. The application was refused since Mrs Z was neither the biological mother (she did not deliver the child) nor she was not an adopting mother (she didn't go through any adoption procedure). She turned to the Equality Tribunal claiming discrimination on the grounds of sex and disability.

Findings of the court:
The Court did not find discrimination either on the grounds of sex or disability. The Court stated that the gender equality Directive 2006/43/EC does not prohibit discrimination of female employees in enjoying their rights with relation to adoption or maternity leave and who arranged surrogate motherhood by commissioning other women. In terms of disability the Court underlined that the concept of disability must be interpreted in the light of the UN Convention on the Rights of Persons with Disabilities and Court's case-law in this field. However, the Court did not find discrimination on the grounds of disability in the situation of a female employee who due to her biological situation is unable to bear a foetus and commissions other women to give birth to her child. The health state of Mr Z was not of the nature that limited her from full and effective participation in professional life on an equal basis with other workers.

Implications:

The Court underlined that the provisions of the UN Convention on the Rights of Persons with Disabilities are not unconditional and not sufficiently precise to have a direct effect in EU law. The validity of Directive 2000/78 cannot be assessed in the light of the UN Convention. Moreover, The Court's judgment also sets rules for determining the borderline between health condition and concept of disability which can not constitute a grounds of discrimination.

Module 7:
The protected grounds of age

Introduction

This module examines in more detail the protection from discrimination on the grounds of age.

An overview of the issues raised in this module is provided by Prof Malcolm Sargeant which highlights key issues relating discrimination on grounds of age.

Transcript of the Video:

My name is Malcolm Sargeant. I'm professor of labour law at Middlesex University Business School in London, UK and I'm talking about the age aspects of the Framework Directive on Equal Treatment in Employment and Occupation. It's a Directive of course that covers a number of grounds in particular it includes age and I think... 2000 was a significant step forward particularly in relation to age because I'm sure it is the reasons why many governments today in the member states have age legislation on their statute book. The principle of equal treatment according to the Directive Article 2 is that there should be no direct or indirect discrimination in this case on the grounds of age. The problem with the Directive and also I think with the decisions subsequently of the European Court of Justice is that there are ample opportunities for making exceptions to the principle of age discrimination or non-discrimination.

Article 6 of the Directive is concerned with age and it actually provides for specific exceptions to the principle of equal treatment. Firstly, it states that differences of treatment on grounds of age shall not constitute discrimination under certain circumstances. They have to be objectively and reasonably justified by a legitimate aim including legitimate employment policy, labour market and vocational training objectives. In addition the means of achieving those aims have to be appropriate and necessary i.e. proportionate. It is not clear to me what legitimate employment policy actually means but the significant result of Article 6 is that it allows for the justification of both direct and indirect discrimination. And it is the only ground of discrimination in any of the equal treatment Directives which allows for the justification of direct discrimination. And I think that's reflected in the decisions of the Court of Justice and indeed some of the national courts.

The Court of Justice I think has shown a somewhat alarming readiness to accept that compulsory retirement policies of employers can be justified as an appropriate and necessary means of achieving a legitimate aim such as creating jobs opportunities for other workers especially in the context of creating job opportunities for young workers. Palacios (Case C-411/05) for example was a Spanish case concerning a collective agreement which contained an agreed retirement age. Mr Palacios was born in February 1940 and worked for his employer since 1981. But in accordance with the collective agreement, his employer notified him in July 2005 of the automatic termination of his contract of employment on the ground that he had reached the compulsory retirement age. He

made a complaint of age discrimination since the notification amounted to dismissal and the measure was based solely on the fact that he had reached the age of 65. But the collective agreement stated that in the interest of promoting employment there would be a retirement age of 65, except where the workers concerned hadn't completed their qualifying period for a pension. So there was caveat that he had to have been entitled to a pension. But nevertheless it is one of the early decisions that shows there is a justification in terms of removing older people from the workforce in order to make room for young people to come into the workforce. And this is really an interesting concept it is something that has been called a lump of labour fallacy and it's a fallacy of course. But it means that policies which are linked to removing older people from the workforce will result in younger people being able to enter into it. And I think that's a problem because it's a fact which has been accepted by the European Court of Justice in a number of cases and its also been accepted in some national courts as it got clear from the references to the Court of Justice. The problem with it of course is that it is a fallacy. There is no empirical evidence at all that removing older people from the workforce actually does create any opportunities for young people or indeed opportunities for anyone else. And so a justification which has been accepted by the Court of Justice and some national courts for intergenerational fairness I think it's called so that there is a sharing of opportunities between old workers and younger workers, this can justify somehow the imposition of a justified retirement age and I think it's called an employer justified retirement age so that the employer can show that because the social objectives of the country in which they operate require an encouragement of youth employment and so on, that it may be one of the social objectives that they can use to justify having a legitimate aim. The problem of course is that the Directive allows for justification for direct and indirect discrimination which amounts to a legitimate aim. There have been a wide number of legitimate aims which have been justified by the courts.

So the court has accepted and I am quite critical of them in this respect, that an exception can be made for to the general principle of equality with regard to age to facilitate the employment of younger workers by a process of older workers. There are a number of cases relating to the professions and I think its been in those cases the courts have accepted the need for or the justification of removing older people, having a retirement age in order to make way for younger people. Petersen was a German case which concerned a complainant who was admitted to the practice of panel dentist in 1974 and reached the age of 68 in 2007 when she was retired. And there were a number of legitimate aims put forward, including the problem of older dentists not being as good as younger ones but one aim concerned the sharing out of opportunity amongst the generations so that, and I quote, 'a measure intended to promote the access of young people to the profession of dentist may be regarded as an employment policy measure' and the Court of Justice concluded that it does not appear unreasonable for the authorities of a member state to consider that the application of an age limit leading to the withdrawal from the labour market of older practitioners may make it possible to promote the employment of younger ones. And this has been an approach that has been followed in the case of Georgiev (C 250/09), which concerned Bulgarian academics, where a Bulgaria professor was mandatorily retired and the court said effectively the same thing there and indeed in other cases.

The basic problem therefore with both the Directives in regard to age and with the Court of Justice decision is this acceptance or this possibility that mandatory retirement can be justified as some way of creating intergenerational fairness. There is no empirical evidence this is the case but he Directive allows this and I think the Court of Justice in a number of cases actually put it into practice. So it is a difficult position for many people now whose employers may contemplate having an employer justified retirement age because the Court of Justice effectively says that it is possible and that the justification can be both for intergenerational fairness and for maintaining the dignity of the older workers when they leave. And really in the future the only way this is going to change is by some cultural change which needs to take place amongst the member states and an acceptance that there needs to be empirical and hard evidence to justify exceptions to the Directive such as this one.

Under the Framework Directive protection from age discrimination is only prohibited in relation to employment, occupations, vocational training and related fields. Unlike racial discrimination, age discrimination is not prohibited in the sectors of the provision of goods and services, education and housing. However, it is important to note that many Member States have gone beyond the minimum requirements of the Framework Directive in their national laws.

Protection from age discrimination is also different from the other grounds of race, religion or belief, sexual orientation, disability and gender in that direct age discrimination can be justified and lawful in certain circumstances.

Under Article 6 of the Framework Directive age discrimination is not unlawful where:

- differences of treatment on grounds of age are objectively and reasonably justified by a legitimate aim (such as legitimate employment policy, labour market and vocational training objectives); and
- if the means of achieving that aim are appropriate and necessary.

Article 6 goes on to provide some examples of such lawful direct age discrimination:

"(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
(b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
(c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement."

Although it is clear from the Framework Directive that direct age discrimination can be justified, several decisions by the Court of Justice of the EU have confirmed

that the prevention of age discrimination remains a fundamental principle of EU law. In Kucukdeveci Case C-555/07 the Court reaffirmed what it had held in the Mangold decision (Case C-144/04) and 'acknowledged the existence of a principle of non-discrimination on grounds of age which must be regarded as a general principle of European Union law'. This means that the same degree of analysis is required as all of the other protected grounds, in determining whether age discrimination is justified.

To date there have been significantly more cases relating to age discrimination before the CJEU than any of the other protected grounds. Broadly speaking these cases fall into three categories:

- cases concerning the lawfulness of national or sector specific retirement ages;
- cases concerning the maximum age at which a person can enter a profession or field of work;
- cases concerning age discrimination against younger workers.

The case studies below provide examples of the issues that have arisen in relation to each category of cases.

Case study: Age discrimination and retirement ages

Palacios Case C-411/05, 16 October 2007

Facts:
This was a Spanish case concerning a collective agreement which contained an agreed retirement age. Mr Palacios was born in February 1940 and had worked for his employer since 1981. In accordance with the collective agreement he was dismissed when he reached the age of 65, after which he made a complaint of age discrimination. The collective agreement stated that 'in the interests of promoting employment', there would be a retirement age of 65 'unless the worker concerned has not completed the qualifying period required for drawing the retirement pension, in which case the worker may continue in his employment until the completion of that period.' So there was a caveat that the employee would be entitled to a full pension before being compulsorily retired.

Findings of the court:
The Court of Justice accepted, as it has done in all cases concerned mandatory retirement, that the policy amounted to less favourable treatment on the grounds of age and therefore needed to have a legitimate aim and show that retirement was an appropriate and necessary means of achieving that aim. The retirement policy seems to have been adopted in Spain, according to the Court, at the instigation of the social partners, as part of a policy of promoting intergenerational employment. The Court stated that this was a legitimate aim. The Court concluded by stating that:
"It does not appear unreasonable for the authorities of a Member State to take the view that a measure such as that at issue in the main proceedings may be appropriate and necessary in order to achieve a legitimate aim in the context of national employment policy, consisting in the promotion of full employment by facilitating access to the labour market."
Thus the Court accepted that an exception could be made to the general principle of equality, with regards to age, in order to facilitate the employment of younger workers. The direct age discrimination was therefore justified.

Implications:
The cases concerning retirement ages have generally found that direct age discrimination is justified in relation to retirement ages as a means of allowing younger workers to enter the employment market.

Case study: Age discrimination and maximum commencement ages

Wolf C-229/08, 12 January 2010

Facts:
Mr Wolf applied for a post in the Frankfurt fire service as a professional fire fighter. Wolf's application was refused as he was 31 (over the limit of 30) and brought a claim challenging the relevant legislation.
The claim related to Article 6 of the Framework Directives, as well as to Article 4 of the Directive, permitting discrimination where:

- a characteristic relating to age is;
- a genuine occupational requirement; and
- objective is legitimate and requirement proportionate.

Findings of the court:
The aim of the legislation was legitimate as it was to ensure the proper functioning of the fire services. Evidence indicated very few employees at the age of 45 could adequately perform fire services.
The legislation was also proportionate as if persons over the age of 30 were able to join, a too large proportion of staff would not be able to perform fire services for a sufficiently long period.

Implications:
In professions or fields of work where physical and mental abilities are crucial for the role it will be more likely that maximum ages for entry into those roles will be proportionate and justified.

Mario Vital Pérez, C-416/13, 13 November 2014

Facts:
Mr Vital Pérez initiated an action before the court against the decision of one of the local Spanish authorities which specified a requirement of a maximum age of 30 for the candidates for local police. Mr Pérez claimed that the age requirement violates the fundamental right of access to public office on equal terms affirmed in the Spanish Constitution and in Directive 2000/78. The local authority which formulated the requirement claimed that the age factor can be deemed as lawful in the light of, *inter alia*, Wolf judgment.

Findings of the court:
The Court reiterated that the principle of equal treatment is a general principle of EU law. Also it was underlined that according to Art. 3(1)(a) of Directive 2000/78/EC prohibition of age discrimination applies to all persons (as regards both the public and private sectors) including public bodies in relation to, inter alia, conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy. The Court found that the case of setting a maximum age for recruitment definitely falls within the scope of the Directive. The Court also analysed the maximum age requirement in question in the light of the Articles 4(1) – genuine occupational requirements and 6(1) -

justification of differences of treatment on grounds of age. The Court evoked its previous judgments in this area and stated that the necessary condition to justify differential treatment on the grounds of age is proportionality. In the case in question, when compared to the Wolf case, not all duties that are attached to the police service require 'exceptionally high physical capacities'. That is why it can not be justified as a permitted exception. When it comes to the exception laid down by the Art. 6 (1) the Court declared that the age limit for recruitment does not constitute a means which is appropriate and necessary in the light of the objective of the Directive.

Implications:
The Court confirmed that the Directive allows for the exceptions from the principle of equal treatment on the grounds of age. However, the conditions of lawfulness of derogation from the principle of non-discrimination must be interpreted strictly. The Court also highlighted that when using the exceptions laid down by the Directive the principle of proportionality must be borne in mind.

Case study: Age discrimination and retirement

Commission v. Hungary, C-286/12, 6 November 2012

Facts:
The European Commission started the infringement procedures against Hungary after adopting national legislative provisions relating to the age-limit for compulsory retirement of judges, prosecutors and notaries at the age of 62. The age limit of 62 was set by the new legislation and lowered the limit from 70 to 62. The Commission raised that the Member State had failed to fulfil its obligations under Directive 2000/78 and the age criterion can not be justified by legitimate objectives and which, in any event, is not appropriate or necessary. The Commission stated that the contested provisions were contrary to Articles 2 and 6(1) of Directive 2000/78 and claimed that the lowering of the age-limit gives rise to a difference in treatment based on age between persons within a given profession. The Commission agreed that Hungary was free to set the age of retirement for those persons. However, it argued that the newly introduced age limits profoundly affect the duration of the working relationship between the parties. Moreover, the new age limits also affect their professional activity, by preventing their future participation in professional life.

Findings of the court:
The Court examined whether the introduction of new age limits is not in breach of Art. 1 of Directive 2000/78, in conjunction with Article 2(2)(a) as well as with Art.6 (1). The Court did not find the breach of the principle of legitimacy of objectives of introducing new age limits. However, the Court stated that the newly introduced Hungarian legislation did not reach the condition of necessity and is not appropriate. By implementing new legal provisions on age limits it automatically deprived individuals from the right to work, for which they were not prepared from the very beginning of their professional careers. As the Court said, the provisions abruptly and significantly lowered the age-limit for compulsory retirement, without introducing transitional measures of such a kind as to protect the legitimate expectations of the persons concerned. Also, the Court declared that the new law does not comply with the principle of proportionality and does not guarantee a simple replacement of generations within the legal professions in question.

Implications:
The Court confirmed that the Member States enjoy their margin of freedom when introducing age limits for certain professions in order to actively influence public employment policies. However, the tools used to regulate these policies must not be disproportionate and must take into account interests of those who are affected by the measures undertaken by the State.

Case study: Age discrimination against younger workers

Kucukdeveci Case C-555/07, 19 January 2010

Facts:
Kucukdeveci had been employed with a company since the age of 18. In December 2006 she was given notice of dismissal at the age of 28 after serving 10 years. Length of notice in German law is dependent on length of service.
Any service under the age of 25 was not to be taken into account in calculating the notice period. To calculate her notice period only a three year period was used (from 25 to 28 years). Kucukdeveci brought a claim of age discrimination.

Findings of the court:
The aim of the national legislation at issue in the main proceedings was to afford employers greater flexibility in personnel management by alleviating the burden on them in respect of the dismissal of young workers, from whom it is reasonable to expect a greater degree of personal or occupational mobility.
The aim of the law was legitimate in strengthening protection of workers based on length of service. But the law was not proportionate as some persons may have long service but not gain added protection, given the 25 age limit. As a result there was unlawful age discrimination.

Implications:
Employers need to carefully assess whether differences in rights associated with employment which are based on age are for a legitimate aim and proportionate.

Academy of European Law

Metzer Allee 4
D-54295 Trier

Rue Belliard 159
B-1040 Brussels

Tel +49 651 93737 0
Fax +49 651 93737 773
info@era.int
www.era.int

ERA is funded with support from the European Commission.This communication reflects the views only of the author, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

Education and Culture DG
Lifelong Learning Programme