

**THE FIGHT AGAINST DISCRIMINATION – THE RACE AND FRAMEWORK
EMPLOYMENT DIRECTIVES
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**GENERAL OVERVIEW, SCOPE OF THE EU DIRECTIVES AND CURRENT
STATE OF TRANSPOSITION – FIONA KINSMAN**

Ladies and Gentlemen,

It is a great pleasure to be able to address this seminar on the EU anti-discrimination Directives. I would like to give you a brief over-view of the two EU Directives, explain some of the legal concepts behind them and tell you how the Member States are doing with their transposition of the Directives into national law.

1. Combatting Discrimination – Achievements to date

Equal pay for men and women was one of the original articles in the Treaty of Rome – 50 years old! More detailed secondary legislation was adopted, banning discrimination between women and men in access to employment, training, in social security and occupational pensions, and most recently in access to goods and services.

The only other sort of discrimination that was banned under EU law was that based on nationality.

But in 1997 the EU Member States unanimously decided to add a new article to the Amsterdam Treaty to ban discrimination across Europe. The new article 13 gave the Council the power to adopt measures to combat discrimination on grounds based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. After the entry into force of the Amsterdam Treaty on 1 May 1999, the Commission put forward a package of proposals to implement article 13 – a three pronged strategy to combat discrimination:

- a Community Action Programme running from 2001-2006 – replaced by the Progress Programme 2007-2013
- a Directive prohibiting discrimination on grounds of race and ethnic origin (Directive 2000/43/EC)
- a Directive prohibiting discrimination on grounds of disability, sexual orientation, religion and age in the employment sphere (Directive 2000/78/EC)

Discrimination

The Directives prohibit discrimination on grounds of race and ethnic origin, religion and belief, age, disability and sexual orientation. They set out *minimum* requirements – so the Member States can provide greater protection. What is meant by "discrimination" under European law? The two Directives contain a specific, common definition:

- direct discrimination
- indirect discrimination
- harassment
- instructions to discriminate

It is important to note that discrimination does not have to be intentional to be unlawful. The definition of indirect discrimination provides that if an apparently neutral provision or practice would place a member of one of the protected groups at a particular disadvantage compared to other people, it is discriminatory unless justified (something we will come onto later).

Who is protected against discrimination? The Directives apply to **all** persons in the European Union, whether or not they are nationals of a Member State, and to both public and private employers. Thus the personal scope is very wide.

In what **fields** is discrimination prohibited? Both Directives cover employment, vocational training, pay and working conditions and membership of organisations of workers or employers. In addition, the Race Directive covers education, social protection and health care and access to goods and services including housing.

Under the Employment Directive "**reasonable accommodation**" must be provided for people with disabilities. This is the provision, by the employer, of measures which will allow a disabled person to work in as equal a way as possible as able bodied people. The employer does not have to provide something which would impose a disproportionate burden on the business. This provision marks a clear conceptual shift away from considering disabled people as in need to protection to people with equal right.

Having looked at who is protected from discrimination in which circumstances, does this mean that *all* differences of treatment are unlawful? No, the Directives contain a number of exceptions:

- justification of indirect discrimination. A difference of treatment caused by a neutral provision or practice will not be unlawful if it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary
- occupational requirements. If a difference of treatment is based on a characteristic which constitutes a "genuine and determining occupational requirement", the difference of treatment will not be unlawful as long as the objective is legitimate and the requirement is proportionate. For example it is clear that to be a fireman a person must be 100% physically able.

- Churches and other organisations based on belief may, in limited circumstances, be able to require an employee to be of the same religious belief if that is strictly necessary for the job in question. This could apply, for example, to the headteacher of a religious school, but not, in our view, to the school's cleaners.
- Nationality. The Directives specifically state that they do not cover differences of treatment based on nationality
- The requirement to provide a reasonable accommodation to enable disabled people to work will not apply if it would impose a disproportionate burden on the employer. Member States may subsidise the costs of reasonable accommodation.
- Member States may provide that differences of treatment based on **age** may be objectively justified by a legitimate aim such as the State's labour market policy, as long as the means of achieving the aim are appropriate and necessary (article 6 of the Employment Directive).
- "Positive action" – we need to bear in mind the rather restrictive attitude of the Court of Justice towards positive action in the sex discrimination field. In addition the Member States have very different traditions in this area.

It has taken the ECJ at least 20 years to establish what can constitute objective justification in the field of sex discrimination. I hope we do not have to wait that long, but it is clear that the boundaries of these exceptions have still to be established. However, The right to non-discrimination is a fundamental right under Community law, and as such exceptions should be *narrowly* interpreted.

Enforcing Rights

What can a person do if they think they have been discriminated against? There is no point having laws prohibiting discrimination if people do not know about them and cannot enforce their rights, which is why both the non-discrimination Directives contain a lot of provisions dealing with redress in the broad sense.

The Member States are required to provide information on the rights that the Directives provide. They must also ensure that organisations that have an interest in non-discrimination may help an individual to take a case to court. This could cover, for example, pressure groups, NGO's, trade unions or equality bodies such as Ombudsmen. This is important because it is very difficult for individuals to bring cases before the courts, primarily because of cost and lack of legal expertise.

If a case goes before the courts, the Directives provide for a **sharing of the burden of proof**. If an alleged victim establishes facts from which the court may presume that there has been discrimination, then it falls to the other party to prove that he or she has *not* discriminated against the person. Under the Directives, the shift of the burden of proof does not apply to criminal procedures, nor to proceedings where the court or competent body has to investigate the facts of the case. In some Member States, where anti-

discrimination provisions are mainly found in the Penal Code, or where there is a reliance on investigative procedures, it seems that there will be very little application of the shift of the burden of proof. This will inevitably make it more difficult for victims of discrimination to enforce their rights.

Both Directives require the Member States to protect people from **victimisation**. This means that if a person makes a complaint of discrimination, or is a witness for example, they should not suffer adverse consequences, such as being dismissed from their job. Fear of retribution following a complaint is real and widespread, so this protection is crucial.

The Directives leave it to the Member States to set out their national rules on sanctions applicable to breaches of the principle of non-discrimination. However, sanctions must be “effective, proportionate and dissuasive”. These terms are not defined, but it is clear from the case law of the European Court of Justice in the sex discrimination field that purely nominal sums would not satisfy the Directives' requirements. In addition, this would breach the general rule set out by the Court that a person must have a personal and effective remedy if their Community law rights have been breached.

Once a Directive has been transposed into national law, a person must take their case under **national law** before the national courts or tribunals. National law must be interpreted in the light of the Directives, in order to achieve their aims.

The Race Directive requires the Member States to designate a **body for the promotion** of equal treatment on the grounds of racial or ethnic origin – the body can be part of the Member State's general human rights agency. The Directive sets out a *minimum* list of competences for this body:

- independent assistance to victims of discrimination in pursuing their complaints
- conducting independent surveys concerning discrimination
- publishing independent reports and making recommendations on any issue relating to discrimination

Some Member States already had bodies to promote equal treatment on grounds of race, such as the Swedish Ombudsman for Racial Equality, the Dutch Equal Treatment Commission or the UK's Commission for Racial Equality.

Although the Employment Directive does not require the Member States to establish bodies to promote equal treatment in respect of other grounds of discrimination, some Member States have gone beyond the minimum requirements, for example in Belgium the mandate of the Centre for Equal Opportunities has been widened to cover the other grounds of discrimination, and the Irish, Cypriot and Hungarian equality bodies deal with discrimination on all grounds.

Lets now look at the **transposition** of the Directives by the Member States. The dead-line for transposing the Race Directive into national law was **19 July 2003**. For the Employment Directive the dead-line was **2 December 2003**, with a further 3 years possible for transposing the provisions on age and disability discrimination:

Belgium, the UK, Germany, the Netherlands and Sweden used the extra 3 years for the age discrimination provisions, with Denmark using only 1 extra year.

France notified the Commission that it would use the extra 3 years for the disability provisions, the UK and Denmark use 1 extra year.

For the new Member States, they should have fully implemented the Directives by the time they joined the European Union on 1 May 2004.

All the Member States had to change their legislation to transpose the Directives.

If the Member States do not notify the Commission of their measures transposing a directive into national law, the Commission can start what are called “infringement procedures” against them. Infringement procedures for non-communication of implementing measures were launched against a large number of the Member States which were late with their transposition, and the Commission had to refer Germany, Luxembourg, Finland and Austria to the ECJ. Now, all the Member States have transposed both anti-discrimination Directives, the last being Luxembourg in December 2006.

Infringements for non-communication of national implementing measures are not the only type of infringement procedure open to the Commission under article 226 of the Treaty. We are now examining in detail the legislation of the Member States which have completed their transposition of the Directives, to see if has been correctly done. As you can imagine, this is a lengthy task, especially when faced with 500 pages of Finnish legislation – to say nothing of Lithuanian or Czech! On the 27 June the Commission will send “reasoned opinions” to 14 Member States for incorrect transposition of the Race Directive – this is the second stage of the infringement procedure, and the first point at which publicity is given, so look out for the press release.

The Commission also receives quite a lot of complaints from individuals or organisations. Usually there is not much we can do, unless the complaint shows that the Member State is clearly in breach of its obligations under the Directives. In that case we would contact the Member State and investigate the complaint, and it could eventually lead to an infringement procedure.

I hope I have managed to give you an overview of the two anti-discrimination Directives. As I am sure you will have realised, the Directives are still fairly new and many questions remain unanswered. So far we have very little jurisprudence of the European Court of Justice to guide us on the correct interpretation of the Directives, and most of the terms are undefined. This makes it very difficult to give advice in individual cases.

Specialist advice centres or equality bodies are often very good at identifying test cases which raise important legal questions, and such questions can be referred to the European Court of Justice for interpretation. So far we have had cases referred to the Court from Spain, Germany, the UK and Belgium, concerning age and disability discrimination and discrimination on grounds of racial and ethnic origin. The first judgments concerned age discrimination and the definition of disability. I'm off to Luxembourg tomorrow morning for the oral hearing in a case concerning whether occupational pension schemes must pay survivors' pensions to the remaining member of a gay registered partnership.

In my view though clearly there is still work to be done, these directives have helped to create an advanced legal framework prohibiting discrimination, which has significantly raised the level of protection in the EU. For more information on the Directives or the work of the Commission in this field, I would suggest looking at our web-page.

Thank you.