



# DEFINITIONS & KEY CONCEPTS

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## PURPOSE & LIMITATION

- Non-discrimination in EU (employment)  
law: general concepts
- Pedagogical & introductory approach
  
- Excluded:
  - Personal scope
  - Proof & remedies
  - Special regimes: age, disability, religion

## STRUCTURE

- Constitutive elements of prohibited discrimination
- Direct, indirect, positive discrimination, and harassment
- Principles of justification



## BRIEF REMINDER: PRINCIPLES



## ACQUIRED PRINCIPLES

- Discrimination is “*the application of different rules to comparable situations or the application of the same rule to different situations*”: **different or identical treatment**
- Based, directly or indirectly on the protected trait: **causation**
- **Direct** discrimination: the individual & the trait
- **Indirect** discrimination: the group & the impact



## A GENERAL PRINCIPLE OF EU LAW

- Gender, age, ...
- Horizontal & vertical
- Not: prohibition of discrimination on ground of health (*Chacon Navas C-13/05*)
- Only: within the scope of EU-law (*Bartsch C-427/06*)



## WARNING

- No comprehensive theory or concept of discrimination
- Organic development, often case-law driven
- Still developing
- Tango between CJEU and national judges



# CONSTITUTIVE ELEMENTS OF PROHIBITED DISCRIMINATION



## PROTECTED TRAITS

- Nationality
- Sex + Gender
- Sexual orientation
- Racial or ethnic origin
- Religion or belief
- Disability
- Age
  
- “Any ground”: Lisbon upgrade of EU Charter of Fundamental Rights



## CONSTITUTIVE ELEMENTS

- Treatment
- Causal link with the protected trait
- Comparison



## TREATMENT

- Action or inaction
- Individual or collective
- *Less favourable* treatment:
  - Different + negative
  - Extent of the difference irrelevant
  - Both a punctual and a global approach



## TREATMENT

- Action/inaction v. intention or simple words
- *Feryn C-54/07* (2008): public declaration that is likely to impact the protected group
- CJEU:
  - Focus on the goal and effectiveness
  - Constitutes direct discrimination, even without any victim
  - Presumption of discrimination for the possible victim



## CAUSATION

- Causal link with the protected trait
- Objective causation:
  - **Motivation** or intention is not determining
  - **External origin** is covered: e.g., clients, the market, the boss
  - Faulty **perception** is covered
  - Protection **by association** is possible



## CAUSATION

- Primary causation (necessary or determining) v. secondary causation: one of the co-determining factors
- Importance of the proof system: ***presumption of causation/discrimination***



## COMPARISON

- Comparison = formal equality
- Employment: in the same company, except if single source (CBA)
- With a person or a group of persons who are objectively comparable (or incomparable), leaving aside the protected trait: the ‘*comparator*’
- Comparison **for the issue *in concreto***, e.g. “equal work” for equal pay



## COMPARISON

- **Present and real**
- **Past and real**
- **Potential** (past/present/future)

☞ *the factual disappearance of the comparator, but for proof expediency*



# DIRECT, INDIRECT, AND POSITIVE DISCRIMINATION

## DIRECT DISCRIMINATION

- “where one person is treated less favourably than another **is**, **has been** or **would be** treated in a **comparable situation** on grounds of...”
- Causation = *a priori* other person would be treated differently

☞ *the factual disappearance of the comparator, but for proof expediency*

## EXAMPLES

- Age:
  - In human resources policies
  - In wage agreements
  - At individual or collective dismissal
  - Importance of justifications
- Gender, racial/ethnic origin and religion :
  - Direct discrimination less common



## INDIRECT DISCRIMINATION

- “where an **apparently neutral** provision, criterion or practice **would put** persons of [the protected trait] at a particular disadvantage compared with other persons”
- Formal neutrality aka intrinsically legitimate
- “Discriminatory” consequences that are **sufficiently disproportionate** (presumption)
- **Comparable situation**



## INDIRECT DISCRIMINATION

- **Statistical analysis** :
  - **Substantially disproportionate** percentages: “a considerably higher number”
  - Statistical impact to be assessed **at the level where the measure/legislation under scrutiny was adopted** (*Allonby, Voss*), *not* the level of its application
  - Difficulty to compose reference groups and become data that are **statistically relevant and cover a sufficient period**



## INDIRECT DISCRIMINATION

- **Potential impact** : “**would put** persons of [the protected trait] at a particular disadvantage”
- ***Intrinsic likelihood & theoretical effect*** – unclear how “particular” the disadvantage has to be



## EXAMPLES

- Seniority or experience → age
- Blue collar / white collar → race, ethnic origin
- Working time organisation → religion/belief
- Clothing conditions → religion/belief
- Language proficiency → race, ethnic origin
- Recruitment criteria (experience, degrees, etc.) → race or ethnic origin



## DIRECT/INDIRECT CAN BE GREY

- Pregnancy - Sex change - Sexual orientation

→ *Whenever a “neutral” criterion is **inseparable from the protected trait**, insofar that only protected persons can be affected: direct discrimination*



## THE HEADSCARF AND RELIGION/BELIEF

- ‘Religion/belief’ covers manifestation of faith in public
- Wearing a headscarf = manifestation of religion...BUT
- *G4S Secure Solutions (C-157/15)*: indirect IF
  - An internal rule of a private undertaking prohibits the visible wearing of *any political, philosophical or religious sign in the workplace*
  - When the application of the rule covers any manifestation of *any beliefs without distinction*

## PERIODS OF SERVICE AND AGE

- Seniority = indirect age discrimination
- Tyrolean Airways C-132/11: “(...) a difference in treatment according to the date of recruitment by the employer concerned (...) is not, directly or indirectly, **BASED on age** (...). That provision is based on a criterion which is neither **inextricably nor indirectly LINKED to the age** of employees, even if it is conceivable that (...)” the time of advancement differs with age

## “POSITIVE” DISCRIMINATION

- Positive action vs. positive discrimination
- Directives authorize:
  - With a view to ensuring full equality in practice,
  - the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures
  - to prevent or compensate for disadvantages linked to the protected trait



## “POSITIVE” DISCRIMINATION

- Formal equality = norm / positive discrimination = the exception
- **Objective nature**: must clearly and objectively address group disadvantages
- **Legitimacy**: real and manifest group imbalance
- **Appropriate & necessary**: proportionality
- No automatic quotas



## THE KEY: PROPORTIONALITY

- **Legitimate aim:**
  - May vary with the ground, but is codified for gender
  - Objective contents
  - Diversity per se is suspect
  
- **Effective:**
  - Proven and genuine imbalance – How much? Where?  
Gradual reduction or just temporary?
  - How effective? Perverse effects?
  
- **Necessary:**
  - Alternatives? Cost/benefit? Narrowly tailored?



## AGE DISCRIMINATION V MARKET: ART. 6 D2000/78

- “Notwithstanding (...) differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are 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.”



## HOW CONSISTENT IS THE CJEU? “POSITIVE” AGE DISCRIMINATION

- How effective is effective? Politics vs. economics and ‘the lump of labour’ fallacy
- How necessary is necessary? Group generalisations vs. personal merit



## COURT OF JUSTICE

- “Accordingly, in the light of the wide discretion (...) **it does not appear unreasonable** for the social partners to take the view that a measure (of automatic termination upon reaching retirement age) **may be appropriate for achieving the aims** set out above.”



# SPECIFIC DISCRIMINATION

## INSTRUCTION TO DISCRIMINATE = DISCRIMINATION

- Instruction to discriminate **on grounds of XX** is equated with XX discrimination.
- Both the instructor and the executor can be involved

## HARASSMENT = DISCRIMINATION

- **Unwanted conduct** (non-verbal, verbal, physical) - purpose or effect of violating the **dignity** of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive **environment**.
- **Harassment**: unwanted **conduct RELATED to the XX of a person**
- **Sexual harassment**: unwanted **conduct of a sexual nature**



## HARASSMENT = DISCRIMINATION

- Any less favourable treatment based on:
  - A person's rejection of harassment
  - A person's submission to harassment



# JUSTIFICATION PRINCIPLES

## CONTEXT

- When faced with a claim of presumptive prohibited discrimination, the defendant can:
  - Contest the existence of a presumption
  - Refute the presumption by giving an objective reason
  - **Accept the discrimination, but try to justify it**

## PRINCIPLES

- Direct discrimination cannot be justified unless explicitly authorised (closed system)
- Indirect discrimination can be justified (open system)



## DIRECT DISCRIMINATION

- Principle : no justification possible, except where authorized by the law
- Authorized in the 2000 Directives:
  - **Age**: legitimate aim with proportionality, e.g. legitimate employment policy, labour market and vocational training objectives
  - **Religion and belief**: the church and *Tendenzbetriebe*
  - When, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a **genuine and determining occupational requirement (GDOR)**
- Gender directives: GDOR exception optional for MS



## GDOR

- Requirement must be **legitimate, i.e. non-discriminatory**: *not the protected ground per se but a characteristic related to that ground (Wolf C-229/08; Prigge C-447/09): ≠ churches and Tendenzbetriebe vis-à-vis religion*
- **Objectively dictated** by the nature/context of the occupation, NOT subjective considerations such as customer wishes (*Micropole C-188/15*)
- Requirement must be **proportionate** – not beyond what is necessary
- Remains **exceptional** and to be determined on a case-by-case basis



## INDIRECT DISCRIMINATION

- General justification:
  - The neutral provision, criterion or practice is *“objectively justified by a legitimate aim and the means to achieving that aim are appropriate and necessary”*



## INDIRECT DISCRIMINATION

- **Legitimate aim**: a real need for the undertaking or an acceptable policy aim - in particular *non-discriminatory*. intrinsically OK
- **Measure is effective** vis-à-vis the aim
- **Measure is appropriate and necessary**: no less discriminatory alternatives to achieve the aim
- Necessary may include inability to offer another post within the company (*G4S Secure Solutions*)
- Case-by-case – **no generalisations and stereotypes**
- **Cost alone may not justify**: case-law in gender issues



## EXAMPLES

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# CONCLUSION

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- Tool box with quite mature concepts
- The implication and application of the concepts leaves plenty of room for interpretation at MS level
- Always a work in progress
- Policy has moved beyond non-discrimination: mainstreaming and positive action
- Law is increasingly involved in identity politics

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