



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



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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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