

Anti-discrimination law: definition of key concepts

Raluca Dimitriu

University of Economic Studies, Bucharest



This training session is funded under the 'Rights, Equality and Citizenship Programme 2014-2020' of the European Commission.

1

Key concepts

- Direct discrimination
- Real/virtual comparability
- Indirect discrimination
- Objective reason
- Harassment
- Instruction to discriminate

2

I. Direct discrimination

3

Direct discrimination

Shall be taken to occur where one person is treated less favorably **(1)** than another is, has been or would be treated in a comparable situation **(2)**, on any of the protected grounds **(3)**.

4

(1) Less favourable treatment

- What is **a treatment**? It could be a simple statement. Sometimes, there is no identifiable victim. E.g.: The public statement by an employer saying that he will not employ workers because of their race or ethnic origin - constitutes direct discrimination in hiring since such statements could prevent certain candidates from submitting their application and thus hinder their access to the labour market (Feryn, C-54/07)
- It can be a benefit, which is not provided for all
- Different doesn't necessarily means less favourable
- The intention - irrelevant

5

(2) The comparator

□ IS –

Present (e.g.: in an equal pay dispute - how much is paid the comparator?)

□ HAS BEEN –

Past (e.g.: how much has been paid the comparator?)

□ WOULD BE –

Virtual – Hypothetical comparator (e.g.: how much would be paid the comparator?)

6

(3) Protected Grounds

- Directive 2000/78: religion or belief, disability, age or sexual orientation
- Directive 2000/43: racial or ethnic origin
- Directive 2006/54/EC; 2004/113/EC: gender
- Under the EU non-discrimination directives the protected grounds are expressly fixed. The list is exhaustive, so other grounds (e.g. sickness) cannot be added (Case C-13/05 Chacon Navas)
- The ECHR, in contrast, contains an open-ended list

7

Disability

- May include not only the obligation 'not to do' but also the obligation 'to do': 'reasonable accommodation' to allow those with physical or mental disabilities to be given equal employment opportunities.
- **Discrimination by association** (Case C-303/06 **Coleman**) - Dismissal of an employee who is not disabled herself, but whose child is disabled.
- **Obesity** – not a 'disability' by its nature - **but** Case C-354/13 **Kaltoft**: when it entails a long-term limitation which results in particular from physical, mental or psychological impairments that may hinder the full and effective participation of that person in professional life on an equal basis with other workers

8

Religion

- ▣ Protected ground + positive freedom
- ▣ Not only traditional religions
- ▣ Religion could be a result of a personal option (personal belief) or it can be an element of the very identity of a community

9

Gender

- ▣ Regulation should not perpetuate a traditional distribution of roles between men and women by keeping men in a role subsidiary to that of women in the exercise of parental authority. (Case C-104/09 Roca Álvarez)
- ▣ Protection can represent discrimination
- ▣ Role of law: *poiesis* or *praxis*?

10

Age

- Young/seniors
- Discrimination in employment may be related to the discrimination in training – which may lead to a lower level of competence for workers, after a certain age.
- Occupational requirements **but** - proportionality principle (Case C-416/13 Mario Vital Pérez - maximum age for recruitment of local police officers at 30 years)

11

Multi-discrimination

- **When grounds intersect**
- A person may be discriminated on two or more grounds in the same time (Minority within minority)
- In most of the traditional minorities discriminated against, women are in even a more disadvantaged position than men (e.g. Roma women)
- Each of us are a combination of belonging to minorities. But the reduction to one dimension – may be sometimes useful practical

12

II. Indirect Discrimination

13

Indirect Discrimination

= an apparently neutral provision, criterion or practice **(1)** that affects a group defined by a 'protected ground' **(2)** in a significantly more negative way by comparison to others in a similar situation **(3)**, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary **(4)**.

14

(1) Neutral rule or practice

- E.g.: Different rules applicable to part-time employees, compared to full-time – with an indirect impact on payment (Schönheit case)
- can result of a similar treatment of two persons being in different situations
- The law should distinguish between **the same** – that deserves equal treatment – and **the different** – that deserves unequal treatment

15

(2) Disadvantage to a person or a group defined by a 'protected ground'

- There is another criterion used, not the protected ground ...
- ... but it should be a certain link.

16

(3) Comparison to others in a similar situation

- an apparently neutral provision, criterion or practice, which places a 'protected group' at a certain disadvantage.
- This is where indirect discrimination differs from direct discrimination:
 - Direct discrimination - focused on the individual
 - Indirect discrimination - focuses on group of individuals
- Consequences already discriminatory, or having the potential to become discriminatory

17

(4) Objective justification

- Legitimate aim + appropriate and necessary means
- Inability to fulfill a fundamental condition of her employment contract - **but** : **the proportionality rule** - C-207/98 – Mahlburg (refusal to appoint a pregnant woman to a post for an indefinite period, because she could not be employed on that position for the duration of the pregnancy)
- Age – certain qualifications required; Special objective justifications: Directive 2000/78 – art. 6: employment policies
- Genuine occupational requirements
- Religion - Case C-414/16 Vera Egenberger

18

Unacceptable defense

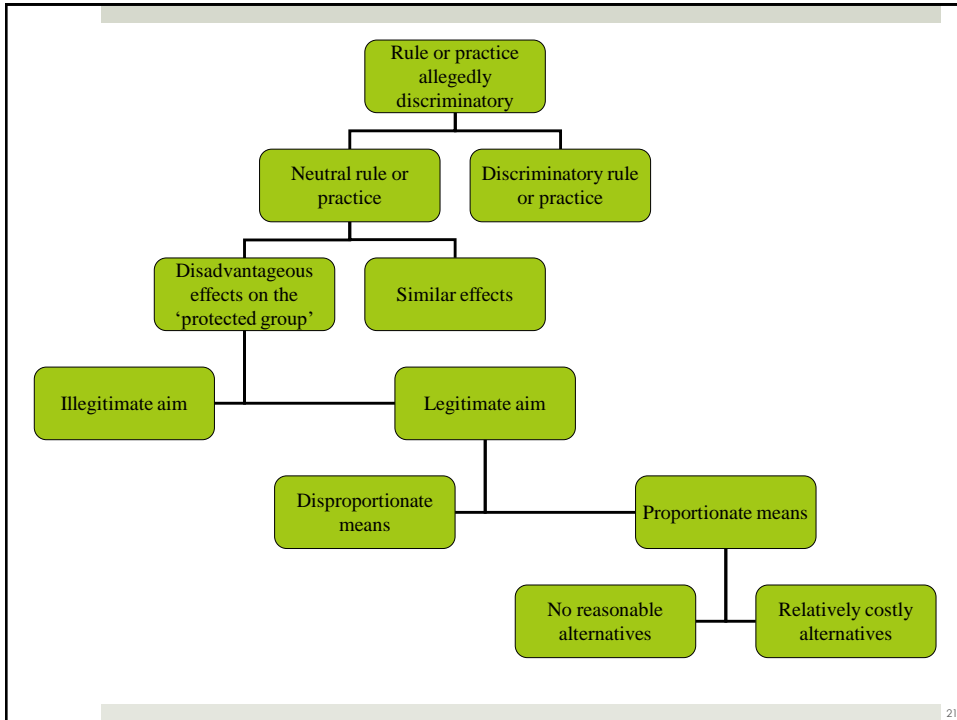
- ❑ **Savings of costs alone** shall not, without other reasons, amount to a legitimate aim so as to justify discrimination (Case C-530/13 Schmitzer)
- ❑ **The clients' request** – Case C-54/07 Feryn, Case C-188/15 – Bougnaoui
- ❑ **Lack of intention** ('I did not want to discriminate'). The victim doesn't need to prove intent or fraud
- ❑ The intention to provide "**protection**" ('women needs protection', so they cannot work night shifts, overtime, on special working conditions, etc.)

19

Example - Bilka case

- ❑ Part-time employees, who were excluded from the occupational pension scheme of Bilka (a department store), complained that this constituted **indirect discrimination against women**, since they made up the vast majority of part-time workers.
- ❑ The ECJ found that this could be indirect discrimination, unless the difference in enjoyment is justified. In order to be justified, it would need to be shown that 'the measures chosen by Bilka correspond to a **real need** on the part of the undertaking, are **appropriate** with a view to achieving the objectives pursued, and are **necessary** to that end.
- ❑ Bilka argued that the aim behind the difference in treatment was to discourage part-time work, since part-time workers tended to be reluctant to work evenings or on Saturdays, making it more difficult to maintain adequate staffing.
- ❑ The ECJ found that this could constitute a **legitimate aim**.
- ❑ However, it did not answer the question of whether excluding part-time workers from the pension scheme was **proportionate** to achieving this aim.
- ❑ The requirement that the measures taken be 'necessary' implies that it must be shown that **no reasonable alternative means exists** which would cause less of an interference with the principle of equal treatment.

20



III. Harassment

Harassment

- shall be deemed to be discrimination when an unwanted conduct related to a protected ground 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.
- There is **no need for a comparator** to prove harassment.

23

Harassment

- Sexual harassment – victims: not only women
- Includes many forms of abuse
- Psychological harassment = improper conduct in the form of physical behaviour, spoken or written language, gestures or other acts, which takes place over a period and is **repetitive or systematic** → a **process** that occurs over time and presupposes the existence of repetitive or continual behavior which is intentional, as opposed to accidental (Cases T-275/17 Michela Curto and T-377/17 SQ)
- Having the effect of undermining the personality, dignity or physical or psychological integrity of a person.

24

IV. Instruction to discriminate

25

Instruction to discriminate

- Is deemed to constitute discrimination, even if no definition is provided by the directives.
- A person instructs another person to engage in direct or indirect discrimination or in harassment against another person

26

Conclusions

- "Why do you discriminate?" – an irrelevant question.
It does not matter the motivation or intent, it only matter the effects
- Objective liability
- **Postmodern approach:** Discrimination is not always based on group characteristics, but sometimes on individual characteristics