

Discrimination – Key Concepts

ERA SEMINAR FOR LEGAL PRACTITIONERS ON APPLYING DIRECTIVES 2000/78 AND 2000/43

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Concepts covered:

Part I	Direct discrimination
Part II	Indirect discrimination
Part III	Harassment

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Part I: Direct discrimination

Directive 2000/43: art 2.2(a)

Directive 2000/78: art 2.2(a)

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Direct discrimination

According to directives 2000/43 and 2000/78 covered by this course, direct discrimination shall be taken to occur where one person is

- (1) treated less favourably than another is, has been or would be treated**
- (2) in a comparable situation**
- (3) on grounds of race or ethnic origin, religion or belief, disability, age or sexual orientation**

Please note: the areas in which the protection applies under two the directives vary between the different grounds. E.g. discrimination on grounds of religion, disability, age or sexual orientation in the field of goods and services is not covered by directive 2000/78 (but may be covered in MS legislation). Furthermore, both directives allow MS to take positive action measures , and, in addition, directive 2000/78 allows for specific exceptions regarding age and disability.

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1. Less favourable treatment

Concept targets inequality by means of different treatment:

- No requirement that the treatment has to be bad in absolute terms, just **worse** than the treatment others receive, has received or would receive
- “Equality in misery” where everyone is equally mistreated is thus not a problem

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1. Less favourable treatment

Actual comparison with how someone who does not possess the protected characteristic *is or was* treated

or

Hypothetical comparison with how someone who does not possess the protected characteristic *would be* treated (relevant in cases where the treatment in question constitutes an apparent mistreatment or at least a deviation from an established norm)

Please note: In practice, the test may seem a bit superfluous in cases of apparent mistreatment directly linked to the protected characteristic.

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2. Comparable situation

Not enough to establish a less favourable treatment *per se*, the treatment has to be less favourable in a comparable situation

To be **comparable**, the situation **does not have to be the same, but similar enough** in order to identify whether indeed the treatment of the person has been (or would be) less favorable than the comparator

Operation of (sometimes very) complex analogical thinking which involves identifying similarities and differences and essentially deciding **whether these are relevant enough to determine wheter the situation is or is not comparable**

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2. Comparable situation

The determination as to whether or not the situation is comparable is **at the very core** of the discrimination assessment as it fills a **double function** with respect to

- (i) the question as to whether a less favorable treatment is covered by the prohibition (because a less favorable treatment in a situation that is not comparable is not covered),
and if so:
- (ii) the question as to whether that treatment was or can be presumed to be causally linked to the protected characteristic.

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2. Comparable situation

If the situation **is not** comparable: => The applicant loses (no need to discuss whether or not there is causal link)

If the situation **is** comparable => The less favorable treatment thus established either proves fully or creates an evidentiary presumption of the existence of a causal link to the protected ground

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2. Comparable situation?

Example 1:

- Ethnic majority person **allowed** entry in store at 17.45
- Visible minority person **refused** entry in store at 17.50

Example 2:

- Ethnic majority person **allowed** entry in store at 17.55
- Visible minority person **refused** entry in store at 17.59

In both examples the store closes at 18.00.

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2. Comparable situation?

The determination as to whether someone who has been mistreated is in a comparable situation could be highly sensitive. For example:

- Is an employee in a registered same sex partnership in a comparable situation with a married person for the purposes of an employment benefit?
- Is a job applicant who for religious reasons respectfully greets everyone by putting his/her hand on his/her chest in a recruitment situation comparable to an employee who greets everyone with a handshake?
- Is a minority person with another hair type than the ethnic majority in a comparable situation with a person belonging to the ethnic majority for the purposes of getting a hair cut in a hair salon only experienced in customers from the ethnic majority?

3. On grounds of race or ethnic origin, religion or belief etc.

If less favorable treatment in a comparable situation is established => causal link with protected ground either proven or presumed.

The presumption can be broken by proving that the less favorable treatment in actuality was due to another cause not connected to the protected ground.

Example: If it is proven that an older job applicant's family ties with a manager was why he was not hired over a younger less qualified job applicant, he was less favourably treated, but not on grounds of his age.

Important: Not only members of protected groups can be less favourably treated on the grounds covered by the directives. All persons who suffer less favourable treatment in a comparable situation on such grounds are protected (C-83/14, *Chez RB* p. 56). This means that also persons wrongly presumed to be of a particular religion, ethnicity, age etc. or because they are associated with a member of a protected group can be subject to direct discrimination.

Part II: Indirect discrimination

Directive 2000/43: art 2.2(b)

Directive 2000/78: art 2.2(b)

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Indirect Discrimination

1. An apparently neutral provision, criterion or practice
2. would put persons of a protected group (identified by racial or ethnic origin, religion or belief, sexual orientation, disability or age) at a particular disadvantage compared with other persons; AND
3. the provision, criterion or practice does not fulfil a legitimate aim; OR
4. cannot be justified as an appropriate and necessary means to attain a legitimate aim.

Note: in rare instances persons not themselves belonging to the protected group can also be victims of indirect discrimination if they suffer a particular disadvantage together with the protected group (C-83/14, *Chez RB* p. 56 and 60).

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1. Apparently neutral provision, criterion or practice

In order to be considered an “apparently neutral” measure, it cannot specifically target persons belonging to a protected group. Examples of apparently neutral measures:

- A restaurant dress code prohibiting waiters to wear anything on the head
- An employment policy for fashion salesclerks demanding candidates to provide proof of physical fitness by exercises recorded in a training app

Please note: When a neutral sounding proxy term is inextricably linked to a protected ground the measure should not be deemed apparently neutral, but instead be assessed as directly discriminatory. E.g. “to be entitled to old age pension” (C-499/08, Ole Andersen p. 23).

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2. Particular disadvantage for a protected group compared to another group

The neutral measure must entail a **particular disadvantage** for the protected group i.e. the measure should **negatively affect** a far larger portion of members of the protected group **compared to** the portion of members negatively affected in a group not displaying the protected characteristic. (C-83/14 *Chez RB* p. 100-101)

E.g. Most of the men in religious group X are bearded as opposed to a minority of the men not belonging to religious group X. Men in religious group X thus suffer a particular disadvantage by a “no beard policy”.

Important: in many cases the particular disadvantage need not be proven “in practice”. It’s enough to point to that the measure *is liable* to have such a negative effect (C-237/94, O’Flynn, p. 21). If the group definition is made narrow, this is far easier, e.g; “Men belonging to religious group X who wear a beard for religious reasons”

However: in situations where a particular disadvantage cannot readily be assumed by the court, statistical evidence may be required to prove it.

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2. Particular disadvantage for a protected group (group comparison)

Which groups could be particularly negatively affected by the following “neutral rules”? Would you need to provide statistical evidence to prove it?

- A restaurant dress code prohibiting waiters to wear anything on the head
- An employment policy for fashion salesclerks demanding candidates to provide proof of physical fitness by running times recorded in an app
- A recruitment algorithm assigning all applicants living in low-income neighbourhoods (defined by postal code) lower scores on hireability than persons living in wealthier neighbourhoods. The hireability scores are used to determine who gets called for an interview.

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3. Objective justification – legitimate aim

If the applicant has succeeded in convincing the court that the neutral measure would put members of a protected group at a particular disadvantage, there is a ***prima facie* case** of indirect discrimination. It is then for the actor that applies the neutral measure to **justify** it in the light of one or several **legitimate aims**. If several aims, each and everyone of them can be used separately to justify the measure.

No exhaustive list of possible legitimate aims, but the aim must objectively address a real need, which sometimes requires proof (C-83/14, *Chez RB* p. 116) and be unrelated to discrimination (Case 170/84, *Bilka* p. 30).

If any of the actual aims behind the neutral measure is tainted by considerations related to a particular group – the application of the measure to persons belonging to that group (or associated with that group) will be directly discriminatory (C-83/14, *Chez RB* p. 91).

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3. Objective justification – proportionality

The challenged neutral measure must be deemed appropriate and necessary to attain the legitimate aim. This is a proportionality assessment that is made in relation to each of the stated aims.

The test of whether the rule is appropriate is essentially a functional test – can the challenged rule attain the aim in question?

The test as to whether the rule is necessary is a test whether the aim could be attained by means less restrictive than the neutral rule.

Important: even if the measure in the abstract could be seen as the most effective to attain the aim, it could still be deemed disproportionate if the disadvantages to the persons affected are such that they outweigh the advantages. The legitimate interests of the persons affected cannot be excessively prejudiced.
(C-83/14 *Chez RB* p. 123 and 128)

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Direct or indirect discrimination?

- Dress code expressly prohibiting headscarfs (but allowing other headgear)
- Dress code banning all headgear to exclude Muslim women, but still applied to everyone
- Dress code banning all headgear, but only applied to Muslim women
- Dress code banning all headgear (applied to everyone)
- Employment policy not allowing persons born in Iran to be hired
- A successful visual pattern recognition test result required for employment

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Part III: Harassment

Directive 2000/43: art 2.3

Directive 2000/78: art 2.3

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Harassment

Unwanted conduct that is **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**.

No need for a comparator!

Examples: name-calling, offensive jokes based on stereotypes, questioning of religious beliefs or practices, freezing out, unwarranted questioning of capacity to perform work, regular assignment of tasks clearly below qualifications/pay grade.

Note: Persons who are not members of a protected group can also be harassed on any of the protected grounds, e.g. by being presumed to belong to the protected group or by being associated to someone who is (see C-303/06, Coleman, p. 38 and 50 in the light of C-83/14 Chez RB, p. 56)

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Direct discrimination or harassment?

A gay man in construction is provided work clothes cut for women

A black couple is asked to move table five times at a restaurant during dinner

An X-rated screen saver is installed on a blind office worker's computer

A Roma guest at a fancy restaurant is loudly asked to pay in advance

A bus company puts all passengers of colour in a separate bus that is equal to the one all white passengers are placed in.

A Sikh custodian is always given the task of cleaning toilets by his team lead

A Jewish nurse is always scheduled on Saturdays despite her protests

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Summary

Direct discrimination: someone is subjected to less favourable treatment than another person is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin, religion or belief, sexual orientation, disability or age.

Indirect discrimination: an apparently neutral provision, criterion or practice would put persons of a protected group (identified by racial or ethnic origin, religion or belief, sexual orientation, disability or age) at a particular disadvantage and the apparently neutral provision, criterion or practice cannot be objectively justified as an appropriate or necessary means to attain a legitimate aim.

Harassment: an unwanted conduct that has the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment. The conduct is linked to racial or ethnic origin, religion or belief, sexual orientation, disability or age.

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