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EU anti-discrimination law: definition of key concepts

Prof. Dr Christa Tobler, LL.M.
Europa Institutes of the Universities of Basel (Switzerland) and
Leiden (Netherlands)

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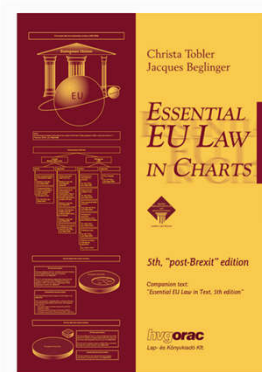
First of all: a note on the material

Charts on EU law

- Lecture contains references to charts.
- These are from:

Christa Tobler & Jacques Beglinger,
Essential EU Law in Charts, 5th, post-Brexit edition,
Budapest: HVG-Orac 2020; www.eur-charts.eu

(There is also a short supplementary text volume:
Christa Tobler & Jacques Beglinger,
Essential EU Law in Text, 5th, post-Brexit edition,
Budapest: HVG-Orac 2020; www.eur-charts.eu)



Procedure in practice

Analysis of discrimination cases in EU law

- First step: Identify the relevant EU legal instrument (discrimination ground, scope of application).
- Then question whether there is discrimination in this legal framework:
 - Requires an analysis of all elements of the relevant provisions.
 - This includes the concept of discrimination and thus the different **forms of discrimination** = **focus of this lecture**.
 - Further, the possibilities of justification (can be different in EU law for different grounds and forms of discrimination).
- Important for these questions: legal text and ECJ case law (here on sex discrimination *and* discrimination on other grounds; reason: basically the same concepts in different areas).



Important for the Member States

EU law sets only minimum requirements

- E.g. Art. 8 of Directive 2000/78:
 - «(1) Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.
 - (2) The implementation of this Directive shall under no circumstances be used as a justification for reducing the general level of protection against discrimination already afforded by Member States in the fields covered by this Directive.»
- Member States may therefore apply a **higher standard of protection** in their law.
- This concerns all aspects of EU anti-discrimination law, including the definition of the different forms of discrimination.

Forms of discrimination in EU law

Different levels of Union law

- Reminder - rules at different levels of Union law:
 - Charter of Fundamental Rights or general principles; see **chart 10/14**.
 - TFEU: Art. 157 para. 1 and 2 TFEU (gender, equal pay).
 - Various directives with different material scope; see **chart 10/8** (see also **chart 10/9**, on Multiple Discrimination).
- Mentioning of forms of discrimination and legal definitions: typical of the **modern generation of anti-discrimination directives**.
- No explicit distinction / legal definitions in:
 - Directive 79/7 (statutory social security, gender).
 - Art. 157 TFEU (equal pay, gender).
 - Articles 21 and 23 of the Charter of Fundamental Rights.
 - However, ECJ seems to use the same definition everywhere; see *MB* (2018) in relation to Directive 79/7; *Praxair* (2019) in relation to Art 157 TFEU.

Forms of discrimination

4 explicitly mentioned forms of discrimination, 3 legal definitions

- **Direct (immediate) discrimination**, with legal definition.
- **Indirect discrimination**, with legal definition.
- **Harassment and sexual harassment**, with legal definition.
- Instruction to discriminate, without legal definition - not discussed further today as it is a simple concept.

See for an overview **chart 10/10**

Forms of discrimination

Development: direct and indirect discrimination

- Originally:
 - ECJ interpreted the prohibitions of discrimination of the EEC Treaty in a uniform sense: prohibition of unequal treatment which is expressly based on the criterion mentioned therein.
 - Corresponds (in part) to the current concept of direct (immediate) discrimination.
- Later, the concept of indirect discrimination was added, which is formally based on a different criterion.
 - First legal definition of indirect discrimination in the so-called Burden of Proof Directive (1980).
 - From 2000 onwards, a new generation of Directives.

Direct discrimination

Legal definition

- E.g. Art. 2(a) of Directive 2004/113:
"where a person is treated less favourably than another is, has been or would be treated in a comparable situation on **grounds of sex**".
- (Leads to prima facie discrimination; subject to legal justification; cf. **chart 10/13.**)
- Definition appears simple: focus on the use of the prohibited criterion.
- But: In more recent court practice, less clear ... (more on this later).

Direct discrimination

Rather rare in ECJ case law today

- E.g. specific cases such as *Feryn* (2008) regarding public statements.
 - Facts:
Director of a Belgian security installation company says publicly that he does **not hire foreigners or Moroccan nationals**. An interest group files a complaint.
 - ECJ:
 - Direct discrimination (through a "speech act"), "as such statements may seriously discourage certain applicants from submitting their applications and thus hinder their access to the labour market. Such discrimination does not require that a complainant who claims to have been the victim of such discrimination be identifiable".
- In contrast, often in the case of age discrimination: e.g. *Prigge* (2011) - see below.

Direct discrimination

Age discrimination: e.g. *Prigge*

- Facts:
The German Lufthansa dismisses pilots when they reach the age of 60 (automatic; collective agreement). Three affected pilots file a complaint.
- ECJ:
 - This is **unequal treatment directly on the grounds of age**: "Such a pilot is in a situation comparable to that of a pilot who is younger than him and performs the same activity for the same airline and/or is subject to the same collective agreement. The former pilot, whose employment contract automatically ends when he reaches the age of 60, receives less favourable treatment on account of his age than the latter."
 - According to the ECJ, there is no justification for this (see below).

Direct discrimination

Examples: *Prigge*

- Theoretically, three grounds for justification are possible.
- None of them caught up in the present case:
 - Neither Art. 2 para. 5 (**public safety**, here aviation safety): Prohibition of the activity is not necessary (at most, restriction of exercise would suffice).
 - Nor Art. 4(1) (characteristic related to one of the grounds of discrimination referred to in Art. 1 of Directive 2000/78 and constituting a "**genuine and determining**" **occupational requirement**): disproportionate age limit.
 - Still Art. 6 para. 1 (legitimate **aim to** be understood in particular legitimate aims from the fields of employment policy, labour market and vocational training, plus appropriate and necessary means): only social policy aims, which is not the case here.

See **chart 10/13**

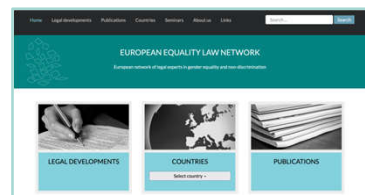
Indirect discrimination

For less obvious cases

- Legal definition, e.g. Art. 2(b) of Directive 2004/113:

"where an **apparently neutral provision, criterion or practice** may put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary".

- Cf. on this topic:
Christa Tobler, *Indirect Discrimination under Directives 2000/43 and 2000/78*. Report for the European Commission's European Equality Law Network (forthcoming, 2022).



Indirect discrimination

Essential elements

- An **impact-oriented** concept:
 - Apparently neutral measure (regulation, criterion, procedure) ...
 - ... with a de facto disadvantageous effect.
- A concept based on the so-called "*rule of reason*", with the possibility of **objective justification**:
 - Measure pursues a legitimate aim ...
 - ... and is proportionate.

See **chart 10/11**

Indirect discrimination

Examples from early ECJ case law

- *O'Flynn* (1996):
 - Scheme in the United Kingdom (UK) whereby persons in need can receive a financial contribution from the state towards the cost of a relative's funeral.
 - Condition: Burial must take place in the UK - disadvantages for migrant workers.
- Part-time work, e.g. *Bilka* (1986):
 - Often mainly women because of traditional roles in the family - can therefore have a discriminatory effect, especially for women.
- Note: Today there is also the specific Directive 97/81, which directly prohibits discrimination on the grounds of part-time work (although with wide possibilities of justification).

Indirect discrimination

A further and problematic requirement

- According to Art 2(2)(b) of Directive 2000/78, indirect discrimination occurs "where an apparently neutral provision, criterion or practice would put persons of a **particular** religion or belief, disability, age or sexual orientation at a particular disadvantage compared with other persons [...]".
- Cf. Art. 2(2)(b) of Directive 2000/43: "persons belonging to a racial or ethnic group".
- ECJ case law on this is different / not the same for all grounds of discrimination
 - application so far with regard to religion and ethnic origin.

Indirect discrimination

Religion: e.g. *WABE* (part of *WABE and Müller*)

- "Service instruction on compliance with the neutrality requirement" of a childcare company for employees with customer contact: "Employees shall not wear any visible signs of their political, ideological or religious convictions towards parents, children and third parties at the workplace".
- ECJ:
 - Indirect unequal treatment exists "if the apparently neutral obligation [...] leads to **persons with a particular religion** or belief being disadvantaged in a special way [...]".
 - It is for the referring court to decide, but "it should be noted that, according to its findings, the [...] rule at issue statistically concerns almost exclusively female workers who wear a headscarf because of their Muslim faith, so that the Court starts from the premiss that that rule constitutes unequal treatment **indirectly** based on religion".
- Note on statistics: possible and, if necessary, required form of evidence.

Indirect discrimination

Ethnic origin: *Jyske Finans*

- A Dane born in Bosnia-Herzegovina applies for a loan with a view to buying a car. Because he was not born in the EU/EFTA, he has to meet additional requirements.
- ECJ:
 - The term "ethnic origin" is based on the idea that social groups are characterised in particular by a commonality of nationality, religion, language, cultural and traditional origin and living environment. The country of birth can also play a role here.
 - But: one characteristic alone is not enough - therefore no direct discrimination.
 - Also **no indirect discrimination** because the country of birth does **not** concern **a particular ethnicity**.
- Criticism in the scientific community. The Netherlands, for example, does not follow this approach (remember: a higher standard of protection is allowed).

A difficult question: comparability

For direct and indirect discrimination?

- ECJ **general definition of equality** as background, e.g. in *Commission v. Hungary* (2011), rec. 50:

"According to settled case-law, discrimination can only arise from the application of different rules to identical situations or from the application of the same rule to different situations [...]."

- Legal definitions of direct and indirect discrimination:
 - Requirement of comparability clearly applies to direct discrimination; see wording of definition.
 - Also for indirect discrimination? Not mentioned in the definition!
 - Controversial in science and in part clearly rejected.
 - According to individual ECJ decisions, however, also (potentially) relevant here, e.g. *Wippel* (2004), *Kenny* (2013), *O* (2015).

Distinction between direct and indirect discrimination

Shifting the dividing line by the ECJ

- Two lines of argumentation of the ECJ - see **chart 10/12** (in an adapted form compared to the print version)
 - Reason for discrimination - *Nikolova*.
 - Type of criterion - *Szpital Kliniczny*.
- *Nikolova*:
 - Situation: Electricity meters are placed too high to be read in districts inhabited predominantly by members of the Roma population group. The complainant is a non-Roma who runs a business in a Roma neighbourhood.
- ECJ:
 - Direct discrimination **when the reason for the difference in treatment is ethnicity**. To be noted here: stereotypes and prejudices.
 - Otherwise indirect discrimination, whereby objective justification must not stigmatise.

Distinction between direct and indirect discrimination

Shifting the dividing line by the ECJ

- The ECJ in *Szpital Kliniczny*:
 - If a provision or practice is **based on a criterion that is inextricably linked to a ground of discrimination**, then there is direct discrimination.
- ECJ gives some examples from previous case law:
 - *Maruko, Roman, Hay* (sexual orientation)
 - *Andersen* (age)
 - *Kleist* (Gender)
- This line is clearly more prominent in ECJ case law.

Distinction between direct and indirect discrimination

Shifting the dividing line by the ECJ: 2nd line

- Early example *Nikoloudi* (2005):
 - Part-time workers could only become scheduled staff if they had previously worked full-time for at least 2 years.
 - According to the General Staff Rules, employment as part-time room attendants was reserved for women.
- Sex discrimination - direct or indirect?
- ECJ:
 - The exclusion of inclusion in the scheduled staff by an apparently gender-neutral reference to **a group of workers consisting exclusively of women by virtue of a national regulation** constitutes direct discrimination on grounds of sex.
 - If men also belong to the group of men in question: indirect discrimination.

Delimitation

Shifting the dividing line by the ECJ: 2nd line

- Example *Maruko* (2008):
 - The surviving partner of a same-sex partnership registered in Germany does not receive a widower's pension because he was not married to his partner.
 - In Germany, only opposite-sex couples can marry.
- General presumption: indirect discrimination on grounds of sexual orientation.
- ECJ:
 - **Direct** discrimination with regard to situations (marriage and registered partnership) which are comparable in the decisive point - but without further explanation.
- Same approach then in *Römer* (2011); explanation finally in *Hay* (2013) - see below.

Delimitation

Shifting the dividing line by the ECJ: Statement in *Hay*

- Facts of the *Hay* case:
 - An employer in France refuses a partner in a registered same-sex partnership (PACS) benefits on the occasion of marriage on the grounds that he is not married.
 - PACS is open to both same-sex and opposite-sex couples.
 - Same-sex couples could not marry at that time.
- Direct or indirect discrimination on grounds of sexual orientation? Argument: cannot be direct if a form of partnership is open to both sexes.
- ECJ:
Direct discrimination (which can therefore only be justified on the basis of a legal ground).

Delimitation

Shifting the dividing line by the ECJ: Statement in *Hay*

- ECJ:
 - "The fact that the PACS [...] is not reserved to homosexual couples is irrelevant and, in particular, does not alter the nature of the discrimination against those couples, for whom - unlike heterosexual couples - it was not **legally possible to contract marriage at** the time relevant to the main proceedings."
 - "A difference in treatment based on the fact that workers are married, rather than explicitly on their sexual orientation, nevertheless constitutes direct discrimination, **as homosexual workers cannot meet the necessary condition to** obtain the benefit claimed because marriage is reserved for persons of different sexes."
- And what about the exclusion effect in this case?

Delimitation

Shifting the dividing line by the ECJ: Statement in *Hay*

- Exclusion effect:
The requirement of marriage excludes all non-married persons, including heterosexual persons in a registered partnership.
- But be careful - direct discrimination requires **comparability of situations!**
 - According to the ECJ, PACS is comparable to marriage in the relevant respects.
 - It affects heterosexual and homosexual persons - but that is not decisive according to the ECJ.
- The decisive factor is rather the **total exclusion** of homosexual persons, where they can never fulfil the criterion in question (marriage) by definition.

Harassment

A special category

- E.g. Art. 2 lit. c of Directive 2004/113:

"where unwanted conduct related to sex occurs in relation to a person with the purpose or effect of violating the dignity of that person and of creating an intimidating, hostile, degrading, humiliating or offensive environment".
- To be noted:
 - Here not based on comparability or a comparison.
 - Background: Catherine MacKinnon's work in the USA from the 1970s onwards.

Cf. again **chart 10/10**

Sexual harassment

Additional element

- E.g. Art. 2(d) of Directive 2004/113:

"any form of unwanted conduct of a **sexual nature**, whether verbal, non-verbal or physical, which has the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment".

- Emphasis here on behaviour of a "sexual nature".

Cf. again **chart 10/10**

Harassment

Example: *Coleman*

- Question first posed in *Coleman* (2008), on disability.
 - "Voluntary" dismissal of a worker in the UK ultimately because of her son's severe disability.
 - Question of discrimination by association, incl. aspect of harassment (offensive statements against the plaintiff).
- ECJ:

"Where it is established that unwanted conduct constituting harassment to which a worker who is not himself disabled is subjected is connected with the disability of his child for whom he is providing substantially the care of which he is in need, such conduct is contrary to the prohibition of harassment".
- So-called. Discrimination by association, here also with reference to harassment.



Universität
Basel

EUROPA INSTITUT
Institute for European Global Studies

Thank you
for your attention!

christa.tobler@unibas.ch

r.c.tobler@law.leidenuniv.nl

