

**THE FIGHT AGAINST DISCRIMINATION
IN THE DAILY PRACTICE**

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THE CONCEPT OF DISCRIMINATION

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INTRODUCTION

THE AIMS OF THIS PRESENTATION

- To create a common understanding of some central legal concepts in non-discrimination law
- To analyse the concepts of direct and indirect discrimination and harassment

Equality is a treacherously simple concept. When asked, hardly anybody would deny that he/she wants a situation where there is legal equality. A lot of people deem it desirable that there is also a certain amount of equality in social and economic life in order to prevent social uproar or political instability. However, when political philosophers and lawyers start to elaborate on the ‘principle’ of equality they hardly ever agree on what this principle means. Very often, these debates get so heated that one can doubt the practical use of any such principle in law or in political life.

In this Conference we are discussing the principle of Equality in European Community law.

I do not have the illusion that we will come to an agreement in this Conference about what this principle (or the legal norms that are derived from it) entails.

Nevertheless, we should strive for a minimum of common understanding of what we are talking about.

That is why I start my presentation today with a short – and therefore unavoidable ‘erratic’ – introduction into some of the main the concepts that play an important role in the debate about the practical use of the principle of equality.

Three concepts play an essential role in that debate: direct discrimination, indirect discrimination and harassment.

This afternoon, when we discuss a fictional case of discrimination, we will need the definitions that I set out to explain in this lecture.

SOME BACKGROUND

MOTIVES TO COMBAT DISCRIMINATION IN THE EUROPEAN UNION

- Economic reasons (e.g. article 119 EEC, articles 12, 18, 34(2), 39, 43, 49, 90 EC)
- Social development (e.g. the Parental Leave Directive)
- Human Rights protection (e.g. Article 13 EC)

The history of anti-discrimination legislation in the EC is as old as the Community itself. The first provisions prohibiting discrimination were mainly inspired by economic motives: preventing unequal conditions for fair and open economic competition within the Community. In later years there was more room for following (also) social objectives, when the Community took it as its responsibility to (also) strive for social justice and stability. Quite recently the Community has adopted it as its responsibility to (also) protect the human rights of the EU citizens.

On this basis we now have an abundance of legal sources that we can use to combat various forms of discrimination within the Community.

SOURCES of equal treatment or non-discrimination law in the EU

- The EU Charter of Fundamental Rights (Art. 20-23)
- (The draft Constitution)
- EC Treaty (Articles 2, 3, 12, 18, 34(2), 39, 43, 49, 90 and 141)
- Directives (Sex Equality Directives, Directives based on Article 13 ECT)
- Case law of the ECJ
- Indirectly: Other Human Rights Covenants; e.g. ECHR, CERD and CEDAW

Besides there are a number of enabling clauses in the EC Treaty, like Article 13 ECT: they provide the legal ground for combating discrimination in the context of the EC. These clauses authorise the Council (based on a proposition of the Commission) and/or the Parliament to take action to combat discrimination on a selected number of grounds and in selected areas (e.g. employment, social security).

THE LEGAL PRINCIPLE OF EQUALITY

There are various ways of approaching the equality issue in law:

- Equality as rationality: likes should be treated alike unless there is a reasonable justification for not doing so. Prohibition of arbitrariness.
- Equality as adjunct to human rights protection: there should be an equal enjoyment of all these fundamental 'social goods' (See Art. 14 ECHR)
- Equality as status based protection against unequal treatment or discrimination: a prohibition to discriminate based on the the recognition that certain groups are being treated less favourably of are excluded on the ground that they have some characteristics that are different from the dominant group or groups in society.
- Equality as transformation: the principle of equality as a vehicle to achieve structural change in order to eliminate discrimination.

STRATEGIES TO PROMOTE EQUALITY

- Individual Rights Strategy (IRS): giving individuals the right to stand up against discrimination by way of offering them legal remedies
- Social Support Strategy (SSS): offering social support to groups that are the victim of (past or present) discrimination in society and need to get equal opportunities
- Strategy for Social and Cultural Change (SSCC): combating the structural causes of persistent discrimination in society (e.g. gender stereotypes that are embedded in social policy or law or in institutional arrangements in society)

PLAN FOR THIS PRESENTATION

WE WILL CONCENTRATE ON

- (Sources): Directives based on Article 13 ECT: 200/43/EC and 2000/78/EC
- (Principle): Equality as status based protection against unequal treatment or discrimination
- (Strategy): Individual Rights Strategy

BASIC CONCEPTS to be discussed in this presentation

- Unequal treatment and discrimination
- Formal and substantive equality
- Direct and indirect discrimination
- Harassment

(If there is enough time I will also say something about instruction to discriminate and victimisation.)

THE LEGAL PRINCIPLE OF EQUAL TREATMENT

According to the ancient Greek philosopher Aristotle equality is:

- Equal treatment of equals
- Unequal treatment of unequals in proportion to their inequality

FORMAL EQUALITY

- Equality of treatment: equal treatment of equals (first part of the Aristotelian formula)
- Equality before the law (equal treatment of those who fall under a certain legal classification – law application)

This approach is called formal because it does not give us any directions as to *what kind of treatment* should be given. As long as the treatment is equal things are o.k. All children get the same education, no matter their personal capacities or background.

SUBSTANTIVE EQUALITY

- Different treatment of unequals with a view to achieving equal social conditions (second part of the Aristotelian formula): aims at equality of outcome / result
- Equality in the law (creation of legal categories in such a way that there is *de facto* equality)

This approach is called substantive because it gives directions about the nature of the treatment: the treatment should be such that the result is that people do have equal positions (or at least equal opportunities to reach equal positions).

Deaf and blind children have a right to different education, in order to make it possible that they achieve the same level of knowledge. This difference in treatment does not infringe the equality principle, on the contrary: a substantive understanding of this principle *requires* such a difference in treatment.

THE ROLE OF LEGAL EQUALITY

Equality as a legal norm can play a role on the

- Vertical level (between government and individual citizens)
- Horizontal level (between citizens)

Directives can only have direct effect on the vertical level

Directives can have effect on the horizontal level

- Via implementation in national law (e.g. Equal Treatment legislation)
- Via the back door (interpreting national law in conformity with the Directives)

THE CONCEPT OF DISCRIMINATION

There are various approaches to the norm that discrimination is prohibited.

Discrimination can be seen as:

- A violation of the (legal) principle of equal treatment before or in the law
- (Status based) unequal treatment between citizens resulting in disadvantage or exclusion
- Disrespectful behaviour, violating human dignity, based on a certain 'feature' or position in society (hate speech, harassment)
- Systematic or structural exclusion of certain groups in society

NON-DISCRIMINATION GROUNDS IN EC LAW

- Nationality (Article 12 ECT)
- Sex (Article 141 ECT and Sex Equality Directives)

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In this Conference we are discussing the following non-discrimination grounds:

Directive 200/43/EC (Race Directive)

- Race / ethnic origin

Directive 2000/78 EC (Framework Directive or Employment Equality Directive)

- Religion or belief
- Sexual orientation
- Disablement
- Age

THE PRINCIPLE OF EQUAL TREATMENT IN THE DIRECTIVES MEANS A
PROHIBITION OF

- Direct discrimination
- Indirect discrimination
- Harassment
- Instruction to discriminate
- Victimisation

AND (in case of disablement) THE OBLIGATION

- To provide a reasonable accommodation

The latter norm will be discussed by Aart Hendriks in his lecture on disability discrimination.

NEGATIVE AND POSITIVE OBLIGATIONS

The prohibition to discriminate mainly means that there are negative obligations (to refrain from ...)

This fits into a formal approach to equality (focussing on the nature of the treatment and on equality before the law).

IS THERE A POSITIVE OBLIGATION TO ACHIEVE (SUBSTANTIVE) EQUALITY?

No:

- Positive action not obliged (except in case of sex discrimination)
- Positive action is seen as an exception to the non-discrimination norm
- No attention is given to structural causes of discrimination (focus on IRS)

Yes:

- Prohibition of indirect discrimination (takes unequal results of formal equal treatment into consideration; i.e. it aims for a result that is equal)
- The duty to provide a reasonable accommodation in case of disablement discrimination means that the outcome or result of the (unequal) treatment (of unequals) is important

DIRECT DISCRIMINATION

Definition: Article 2, par. 2 (a) of Directive 2000/43/EC and 2000/78/EC

Important elements:

- A less favourable treatment
- A comparable situation
- A relationship with one of the non-discrimination grounds of the Directives

Problems:

- What kind disadvantages? (material / immaterial)
- How to find the suitable comparator?
- Danger of assimilation to the dominant norm
- Lack of clear definition of the grounds (i.e.: what is a disablement?)

JUSTIFICATION OF DIRECT DISCRIMINATION

Is it possible to justify a situation of direct discrimination?

Important guidelines to keep in mind:

- In case of direct discrimination there is a closed system of justification (except with age discrimination)
- Narrow interpretation of the justifications by the ECJ

Directive 2000/43/EC:

- Genuine and determining occupational requirements (Article 4)
- Positive action programs (Article 5)

Directive 2000/78/EC:

- Measures necessary for public security et cetera. (Article 2 par. 5.)
- Occupational requirements (Article 4, par. 1.)
- Occupational activities within churches et cetera (Article 4, par. 2)
- Positive action programs (Article 7, par. 1.)
- Social measures for disabled persons (Article 7, par. 2)
- Specific positive action programs in Northern Ireland (Article 15.)
- In case of age discrimination: See Article 6.

NB: It is up to the ECJ to interpret the scope and meaning of these justification defenses. In case a national judge has doubts as to which situations may be brought under one of these 'exceptions' (as they are often – incorrectly – called) he / she should ask preliminary questions to the Court of Justice.

OCCUPATIONAL REQUIREMENTS AND POSITIVE ACTION

Especially difficult are the justifications of:

- ◆ Occupational requirements (especially in the case of disablement discrimination)
- ◆ Positive action

As to the occupational requirements the Preamble of the General Framework Directive clearly states that they should be used very restrictively as a justification for unequal treatment (Preamble, par. 23.) There are two proviso's:

- the aim that is served by this requirement should be legitimate (i.e.: non-discriminatory in itself!)
- and the requirement should be proportionate

As to positive action one should keep in mind that the ECJ – in case of sex discrimination – has interpreted a similar justification clause in a very restrictive way. This is because any positive action in favour of a certain group will automatically mean that members of other groups will not have the same rights under the programme and thus will (in theory) be discriminated. The Court has given some general guidelines as to the question under what conditions positive action programmes are allowed in its sex equality cases. (e.g. *Kalanke*, C-450/93 and *Abrahamson*, C-407/98.)

Kalanke: national rules which guarantee women absolute and unconditional priority for appointment or promotion overstep the limits of the exception of article 2(4) of the Sex Equality Directive. The aim could not be to achieve equal results, only equal opportunities.

In ***Abrahamson***, the Court sticks to this restrictive approach. The criteria used and an appointment procedure must be transparent and amenable to judicial review in order to obviate any arbitrary assessment of the qualification of the candidates. The Court also mentions the principle of proportionality: giving absolute preference to one sex is in any case disproportional to any given aim. (Par. 55).

INDIRECT DISCRIMINATION

Definition: Article 2, par. 2 (b) of Directive 2000/43/EC and 2000/78/EC

This involves a two-fold test:

- (a) Is there a (a) *particular disadvantage* caused by (b) certain *provisions, criterion or practices*? (Claimant)
- (b) Is there an objective justification for this situation? (Defendant)

NB: especially in the case of indirect discrimination a correct division of the burden of proof is crucial.

(a): How to assess whether this is the case? How to prove this? What is 'particular' (how big has the difference in outcome have to be?) Statistical evidence? Or common knowledge? In EC law you can find different criteria for this. The Framework Directive and the Racial Equality Directive require that a practice, etc puts persons of a certain religion or belief, race etc.. at a particular disadvantage. The Burden of Proof Directive requires that this practice disadvantages a substantially higher proportion of one group compared to another and the ECJ stated in the O'Flynn case with respect to indirect nationality discrimination: is liable to affect one group more than another.

(b) it must concern a provision, criterion, and practices: this is very broad. There must be shown some 'cause' of the difference in outcome for the respective groups, and this cause must somehow be linked to the dealings (or non-dealings!) of the defendant.

OBJECTIVE JUSTIFICATION FOR INDIRECT DISCRIMINATION

Is it possible to justify a situation of indirect discrimination?

- In case of indirect discrimination we have an open system of (objective) justifications
- Criteria for objective justifications can be found in Article 2, b (i) + case law ECJ

TEST

- The defendant should bring forward the *aim* of the provision, criterion or practice, and has to prove
 - a. that this aim corresponds to a real need of the undertaking or meets a necessary aim of the social policy of a Member State (See e.g. Bilka, C.- 170/84 and Nimz, C.- 184/89)
 - b. that this aim in itself has nothing to do with discrimination on one of the forbidden grounds
- The defendant should prove that the *means* (i.e. the contested provision, criterion or practice) of achieving this aim are *appropriate and necessary*. This means
 - a. that the aim could not be reached with other (less damaging) means (necessary)
 - b. that the means are proportional to this aim and are effective to reach this aim (appropriate)

HARASSMENT

Definition: Article 2, par. 3 of Directive 2000/43 and 2000/78

Elements:

- Unwanted conduct (danger of subjectivity)
- with the purpose or the effect (objectified)
- of violating the dignity of a person (what is 'dignity'?)
- and (commutation of criteria)
- of creating an intimidating, hostile, degrading, humiliating or offensive environment

Questions

- Who can be held responsible for violation of this norm? Employer? Colleagues? Service provider?
- What is an appropriate sanction in case of harassment?
- Is a justification of harassment possible?

INSTRUCTION TO DISCRIMINATE

Definition: Article 2, par. 4 of Directive 2000/43 and 2000/78

Difficulties and questions:

- No definition of what an ‘instruction’ is
- Who can violate this provision: the employer, colleagues?
- What is the appropriate sanction in this case?
- Is a justification of an instruction to discriminate possible?

PROTECTION AGAINST VICTIMISATION

Definition: Article 9 Directive 2000/43 and Article 11 Directive 2000/78

- Broad protection: Any adverse treatment of adverse consequence
- Responsibility of Member States to provide this protection: damages when failure to do so?

Appendix

How to establish whether there is a case of discrimination?

In any (fictional or real) case that you want to deal with you need to answer a list of questions before arriving at a conclusion whether a certain situation indeed constitutes a form of discrimination that is prohibited under EC law. It is logical to start at the top of this list.

(NB: in the list below I leave aside nationality discrimination and sex discrimination and concentrate exclusively on the grounds mentioned in the Directives 2000/43/EC and 2000/78/EC.)

1. Is there a complaint about a behaviour, rule, regulation, practice or custom that affects one of the non-discrimination grounds that are regulated in EC law? I.e.: does it concern race or ethnic origin, sexual orientation, religion or belief, disablement or age? How are these terms defined in EC law? Does the situation at hand fall under one of these definitions? If not: case dismissed! (NB: it still could be a case of nationality discrimination or sex discrimination!)
2. Does the situation at hand fall under the material scope of the relevant EC-legislation? (Material scope, see Article 3 of Directive 2000/43/EC and Directive 2000/78/EC) Take note that the ECJ still has to decide about what precisely falls under the scope of the Directives 2000/43/EC and 2000/78/EC. In sex discrimination and nationality discrimination cases the Court tends to interpret the scope broadly and brings more situations under the relevant provisions than one should think at first hand. See e.g. Seymour-Smith, C-167/97 (regarding 'pay'), Marshall, C-152/84 ('dismissal') and P v S and Cornwall, C-13/94 ('gender-reassignment'). If not: the case does not fall under the terms of EC law, but perhaps there are other legal remedies in national law!
3. Is an exception to the material scope applicable? NB: be aware that some situations are excluded from the scope of the Directives. In Directives 2000/43

and 2000/78 you find the nationality legislation (in Article 3, par. 2) and in Directive 2000/78/EC you find the exclusion of social security provisions and of armed forces in case of disability discrimination (in Article 3, par. 3 and par.4.) If so: the case does not fall under the terms of EC law, but perhaps there are other legal remedies in national law!

4. Has there been a timely and correct implementation of the relevant Directive (or provision of a Directive) in the EU Country where the situation occurs? (If not: answer questions 5 and 6.)
5. If not: could this provision possibly have (vertical or horizontal) direct effect? (Criteria: a provision must be clear, precise and unconditional enough to be considered justiciable. C-63/99: Gloszczuk. NB: EC Directives can not have horizontal direct effect!)
6. If there is no direct effect: could this provision otherwise have an impact on the court procedure (e.g. interpreting national legislation in conformity with EC law)?
7. Suppose the answers to questions 1-6 can be answered in the positive: is this possibly a case of
 - direct discrimination: go to the questions 9-12
 - indirect discrimination: go to the questions 13-14
 - incitement: go to the question 15
 - harassment: go to the questions 16
8. Only in case of disablement discrimination: Is there a duty to provide a reasonable accommodation? If so: you need to go into details about whether this specific norm is violated. See Article 5 of Directive 2000/78/EC. (Aart Hendriks will explain this in his paper.)
9. In case you suspect that there is a case of direct discrimination: does the situation fall under the definition given in the Directives (e.g. Article 2, par. 2 (a) of Directive 2000/78/EC). The definition of direct discrimination means that there

needs to be (a) a less favourable treatment and (b) a comparable situation. There also needs to be a close and direct connection between the less favourable treatment and the non-discrimination ground! If not: you could still test whether this is indirect discrimination (see questions 13-14).

10. If your case meets these criteria you can move on to the next question: is there a possible justification for the direct discrimination? NB: in case of direct discrimination there is a closed system of justifications (except in the case of age discrimination). This means that only (one or more) the exceptions that are listed in the Directives may be brought forward as a justification defence.

11. These are, according to Directive 2000/43/EC:

- Genuine and determining occupational requirements (Article 4)
- Positive action (Article 5)

12. These are, according to Directive 2000/78/EC:

- Measures, laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others. (Article 2 par. 5.)
- Occupational requirements that are related to any of the grounds listed in Article 1 of the Directive (Article 4, par. 1.)
- Occupational activities within churches and other public and private organisations that are based on a religious ethos (Article 4, par. 2)
- Positive action programs (Article 7, par. 1.)
- Social measures for disabled persons (Article 7, par. 2)
- Specific positive action programmes in Northern Ireland (police and teaching staff) (Article 15.)
- In case of age discrimination: See the examples of possible justifications in Article 6. NB: besides there is always the possibility to bring forward an objective justification. See below, under indirect discrimination what this term means!

(There is no room here to go into details about the specific requirements for these justifications! Be aware that the ECJ tends to interpret such justification clauses very restrictively!)

13. In case you suspect that there might be a case of indirect discrimination: does the situation fall under the definition given in the Directives (Article 2, par. 2 (b) of Directive 2000/43/EC and 2000/78/EC)?

This involves a two-fold test:

1. Is there a (a) *particular disadvantage* caused by (b) certain *provisions, criterion or practices*?
2. Is there possibly an objective justification for this situation?

Ad 1 (a): how to assess whether this is the case? How to prove this? What is 'particular' (how big has the difference have to be?) Statistical evidence? Or common knowledge?¹

Re 1 (b) provision, criterion, and practices: this is very broad. There must be shown some 'cause' of the difference in outcome for the respective groups, and this cause must somehow be linked to the dealings (or non-dealings!) of the defendant.

NB: the claimant has to prove that there indeed is a *prima facie* case of indirect discrimination.

Re 2. If there is a *prima facie* case of indirect discrimination it still has to be ascertained that there is no objective justification for this provision, criterion or practice. See Question 14.

14. The ECJ narrowly describes the test whether such objective justifications are indeed "an excuse" for the fact that *de facto* people are disadvantaged by a

¹ In EC law you can find different criteria for this. The Framework Directive and the Racial Equality Directive require that a practice, etc puts persons of a certain religion or belief, race etc.. at a particular disadvantage. The Burden of Proof Directive requires that this practice disadvantages a substantially higher proportion of one group compared to another and the ECJ stated in the O'Flynn case with respect to indirect nationality discrimination: is liable to affect one group more than another.

formally neutral provision, criterion or practice. (See e.g. Bilka, C.- 170/84 and Nimz, C.- 184/89.) It involves the following steps:

1. The defendant should bring forward the *aim* of the provision, criterion or practice, and has to prove:
 - c. that this aim corresponds to a real need of the undertaking or meets a necessary aim of the social policy of a Member State (See e.g. Bilka, C.- 170/84 and Nimz, C.- 184/89);
 - d. that this aim in itself has nothing to do with discrimination on grounds of race or ethnicity, age, disablement, religion or belief or sexual orientation.
2. The defendant should prove that the *means* (i.e. the contested provision, criterion or practice) of achieving this aim are appropriate and necessary. This means:
 - c. that the aim could not be reached with other (less damaging) means (necessary)
 - d. that the means are proportional to this aim and are effective to reach this aim (appropriate).

15. Is this possibly a case of instruction to discriminate? Where is this defined? (You will find no definition of the notion of an instruction in the Directives!)

16. Is this possibly a case of harassment? Harassment is the case when unwanted conduct related to any of the non-discrimination grounds takes place with the purpose or the effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. (Article 2, par. 3 of Directive 2000/43 and 2000/78.) You need to interpret all these terms! (There is as yet no case law in which the ECJ interprets these terms.)

17. Finally, there may be circumstances that indicate that there is a case of (prohibited) victimisation. See Article 9 Directive 2000/43/EC and Article 11 Directive 2000/78/EC.