

# Definitions of Key Concepts: Direct and Indirect Discrimination, Harassment

Prof. Dr. Christa Tobler, LL.M.  
(Universities of Basel and Leiden)

ERA Trier, 28-29 November 2005

The fight against discrimination: the Race and Employment  
Framework Directives

Prof. Dr. Christa TOBLER, LL.M.  
christa.tobler@unibas.ch r.c.tobler@law.leidenuniv.nl

Universities of Basel (Switzerland) and Leiden (The Netherlands)  
http://www.europa.unibas.ch http://www.europa.instituut.leidenuniv.nl

MasterLecture05

## OVERVIEW

- Introduction: background and context
- Different types of discrimination under EC social law:
  - Case law-based definitions
  - Explicit references in secondary law
  - Legal definitions
- Harassment as a form of discrimination:
  - Definition in Staff law
  - Legal definition
- Conclusion

Prof. Dr. Christa TOBLER, LL.M., Universities of Basel (Switzerland) and Leiden (The Netherlands)

2

## PLACING THE ISSUE

- “Discrimination” as a key concept in the Directives.
- Namely: prohibited behaviour.
- To be seen against the background of the Directives’ field of application!!
- Relevance in concrete cases:
  - Do the facts fall under one of the anti-discrimination Directives?
  - Is there discrimination?
  - Can the discriminator rely on a justification ground?

Prof. Dr. Christa TOBLER, LL.M., Universities of Basel (Switzerland) and Leiden (The Netherlands)

3

MasterLecture05

## DISCRIMINATION GROUNDS IN EC LAW (1)

- Social law as part of a larger body of EC non-discrimination law.
- Background:  
The (unwritten) general equality principle / the general principle of non-discrimination.
- As expressed in numerous provisions of written law prohibiting discrimination on various different specific grounds.

Prof. Dr. Christa TOBLER, LL.M., Universities of Basel (Switzerland) and Leiden (The Netherlands)

4

## DISCRIMINATION GROUNDS IN EC LAW (2)

### Examples of specific grounds

- From the beginning (1957/1958), e.g.:
  - Nationality (for all EC law).
  - Origin of a good (common market).
  - Sex (employment and social insurance).
- As of 1998 Staff law (internal employment law of the EC):
  - Introduction of explicit grounds.
  - Today: “Any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, or sexual orientation.”
- Most recently (2000 and 2004): Race, religion, handicap, age, sexual orientation (EC social law).

Prof. Dr. Christa TOBLER, LL.M., Universities of Basel (Switzerland) and Leiden (The Netherlands)

5

MasterLecture05

## DISCRIMINATION GROUNDS IN EC LAW (3)

### EC social law outside sex discrimination

- Amsterdam Treaty revision (in force since 1 May 1999):  
Legal basis for certain additional discrimination grounds (plus sex outside employment; Art. 13 EC).
- Race Directive, 2000:  
Discrimination on grounds of race and ethnic origin.
- Employment Framework Directive, 2000:
  - Religion or belief
  - Disability
  - Age
  - Sexual orientation.

Prof. Dr. Christa TOBLER, LL.M., Universities of Basel (Switzerland) and Leiden (The Netherlands)

6

## DISCRIMINATION GROUNDS IN EC LAW (3)

# DISCRIMINATION GROUNDS IN EC LAW (4)

## For purposes of comparison: the EU Charter of Fundamental Rights

- Art. 20: “Everyone is equal before the law.”
- Art. 21:
  - “any discrimination based on any ground ...
  - ... such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation”.
- BUT: so far not binding on the Member States!
- Would have become binding under the Constitutional Treaty.

# DIFFERENT TYPES OF DISCRIMINATION (1)

## Generally: different notions of discrimination

- In the various contexts, discrimination can take different forms.
- Three types to be discussed today:
  - Direct discrimination.
  - Indirect discrimination.
  - Harassment.
- [Examples of other types that are not discussed:
  - Structural discrimination.
  - Factual discrimination.]

# DIFFERENT TYPES OF DISCRIMINATION (2)

## Meaning under the two Directives?

- Direct discrimination, indirect discrimination and harassment explicitly mentioned in the Race and the Employment Framework Directives.
- Meaning?
- Elements for the answer:
  - Directives provide legal definitions.
  - However, a legal definition may not answer all questions.
  - So far no explanatory case law by the Court of Justice.
  - But: concepts already known from other areas of EC law.
  - Therefore: comparative approach highly advisable!

# ORIGINALLY: ONLY DIRECT DISCRIMINATION

## Originally: only one type of discrimination

- Discrimination explicitly and obviously based on the prohibited criterion.
- E.g. sex discrimination in Elizabeth von Arnim’s novel “Elizabeth and her German garden” (1875):
  - Pay practice for hired hands on the author’s husband’s farm.
  - “[The men] get a mark and a half to two marks a day and as many potatoes as they can eat. The women get less, not because they work less, but because they are women and must not be encouraged.”
- Then not called “direct discrimination” but simply “discrimination”.

# INCLUDING INDIRECT DISCRIMINATION (1)

- Distinction between direct and indirect discrimination developed in the ECJ’s case law.
- Starting points:
  - Free movement of workers (nationality): *Ugliola* (1969), *Sotgiu* (1974).
  - Staff law (sex): *Sabbatini* (1972).
- Idea:  
Not only obvious discrimination on a given ground must be prohibited but also less obvious forms of discrimination.

# INCLUDING INDIRECT DISCRIMINATION (2)

## Example: *Sotgiu*

- Separation allowance for workers employed away from home.
- Different amount depending on the situation at the beginning of employment:
  - 10 DM for those then living in Germany.
  - 7,50 DM for those then living in another country.
- In fact clear: second category = predominantly foreigners.

## INCLUDING INDIRECT DISCRIMINATION (3)

- The ECJ in *Sotgiu*:  
“The rules regarding equality of treatment [...] forbid not only overt discrimination by reason of nationality, but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.”
- Distinction linked to the specifically prohibited discrimination ground.
- Terminology:
  - Overt = direct discrimination.
  - Covert = indirect discrimination.

## INCLUDING INDIRECT DISCRIMINATION (4)

### Concern: effectiveness of non-discrimination law

- Explicit statements by the ECJ in *Sotgiu* (1974).
- Prohibition not only of direct but also of indirect discrimination “is necessary to ensure the effective working of one of the fundamental principles of the Community” (meaning: the equality principle).
- Said in the context of nationality but - obviously - not limited to this issue!

## DEFINING INDIRECT DISCRIMINATION (1)

### First step: relevance of disparate effect

- ECJ in the foundational cases:
  - Different treatment based on an apparently neutral ground.
  - But: in fact different effect (“disparate effect”).
  - Thus: largely same effect as reliance on the explicitly prohibited ground.
- Typical: disparate effect not visible from the contested rule, but only when viewing the rule in its context.
- So-called *prima facie* (or: apparent) indirect discrimination.

## DEFINING INDIRECT DISCRIMINATION (2)

### Second step: “objective justification”

- Sex equality as the starting point:
  - Case law relating to sex discrimination in the field of pay (*Jenkins*, 1981).
  - *Bilka* (1986): there is no breach of EC law “if the undertaking is able to show that its pay practice may be explained by objectively justified factors unrelated to any discrimination on grounds of sex”.
- *O’Flynn* (1996), in relation to nationality:  
“objective considerations independent of the nationality of the workers concerned, proportionate to the legitimate aim pursued by the national law”.

## EXPLICIT REFERENCES IN WRITTEN LAW (1)

- Starting point: EC sex equality law.
- Directives:
  - [NOT: Equal Pay Directive, 1975.]
  - As of the Second Equal Treatment Directive (1976).
- Wording:  
“No discrimination on whatsoever grounds of sex either directly or indirectly by reference in particular to marital or family status”.

## EXPLICIT REFERENCES IN WRITTEN LAW (2)

### Explicit references in the Directives under consideration

- Art. 2(1) Race Directive:  
“For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.”
- *Mutatis mutandis*, same in Art. 2(1) Employment Framework Directive.

## LEGAL DEFINITIONS (1)

- Starting point:  
EC sex equality law (Burden of proof Directive, 1997).
- Then the Directives under consideration:
  - Race Directive (2000).
  - Employment Framework Directive (2000).
- Later: other sex equality measures
  - Revised Second Equal Treatment Directive (2002).
  - Goods and Services Directive (2004).
- In the future:  
The Recasting Sex Equality Directive (proposal of 2004).

## LEGAL DEFINITIONS (2)

### Direct discrimination

- Art. 2(2)(a) Race Directive:  
“Direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin.”
- Art. 2(2)(a) Employment Framework Directive: *mutatis mutandis* the same.

## LEGAL DEFINITIONS (3)

### Similarities and differences with the case law definition

- Same: comparison-based concept
  - “Treated less favourably than another”.
  - In a comparable situation.
- Different: hypothetical cases included in the legal definition
  - “Would be treated”.
  - In contrast, sex equality *case law* requires an actual comparator (*Macarthy*, 1980).
  - [Note: different *legal* definitions for sex discrimination!]

## LEGAL DEFINITIONS (4)

### Indirect discrimination

Art. 2(2)(b) Race Directive: „Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.“

## LEGAL DEFINITIONS (5)

### Indirect discrimination under Art. 2(2)(b) Employment Framework Directive

- *Prima facie* indirect discrimination:  
“Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons ... “
- [Objective justification - see next sheet.]

## LEGAL DEFINITIONS (6)

### Indirect discrimination as defined in Art. 2(2)(b) Employment Framework Directive

- [*Prima facie* indirect discrimination - see previous sheet.]
- Objective justification:  
“... unless:  
(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or  
(ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.“

## LEGAL DEFINITIONS (7)

### Similarities and differences with the case law definition

- Same: the usual constituent elements (apparently neutral provision, particular disadvantage, objective justification).
- Different from earlier case law definition in the field of social law: “liability approach”
  - “Would put at a particular disadvantage”.
  - Important consequences on the level of proof!
  - Statistics not necessarily needed.
  - Though: see the statements in the preambles on proof!
- Special: Art. 2(2)(b)(ii) concerning indirect discrimination on grounds of disability. Meaning?

## LEGAL DEFINITIONS (8)

### Specifically: statistical proof under the legal definitions

- Lessons from sex equality case law.
- *Seymour-Smith* (1998): two different tests!
- “[...] whether the statistics available indicate that a considerably smaller percentage of women than men is able to satisfy the condition [...] required by the disputed rule. That situation would be evidence of apparent sex discrimination unless the disputed rule were justified by objective factors unrelated to any discrimination based on sex. That could also be the case if the statistical evidence revealed a lesser but persistent and relatively constant disparity over a long period between men and women who satisfy the requirement [...]”

## DIVIDING LINE

### Direct - indirect discrimination

- Again, lessons from case law concerning other areas of EC law.
- ECJ takes a formal approach in relation to direct discrimination:
  - Explicit reliance on a prohibited ground.
  - E.g. discrimination on grounds of sex:
    - Explicit reliance on sex difference (again, e.g. E. von Arnim).
    - Though including “pregnancy” (= sex, even in the absence of a male comparator; *Dekker*, 1990).
  - Not:
    - Apparently neutral criteria with in fact the *same* effect as the directly prohibited criterion.
    - E.g. place where military service was done, in the context of discrimination on grounds of nationality (*Mora Romero*, 1997).

## HARASSMENT (1)

### Before the legal definitions: staff cases

- E.g. Case T-333/99 *X v European Central Bank* (2001):  
„The applicant had harassed a colleague by sending the latter by electronic mail, despite his protestations, messages containing pornographic and/or ideologically extreme material, by refusing to respect that colleague’s working environment, by provoking him with gestures of a sexual nature, by insinuating that the colleague in question was homosexual and by threatening physical assault“.
- Case T-11/03 *Elizabeth Afari v European Central Bank* (2004):  
Refers to the definition in the Race Directive.

## HARASSMENT (2)

### Legal definitions

- First definitions:  
The Directives under consideration (Race Directive, Employment Framework Directive).
- Then sex equality law:
  - Revised Second Sex Equality Directive (2002).
  - Goods and Services Directive (2004).
  - In the future: the Recasting Directive (proposal of 2004).

## HARASSMENT (3)

### Legal definitions

- **Art. 2(2)(c) Race Directive:**  
„[...] when an unwanted conduct related to racial or ethnic origin 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. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.“
- *Mutatis mutandis* the same in the Employment Framework Directive.

## HARASSMENT (4)

### Special features

- Untypical concept of discrimination!
- Usually in EC law:  
“Comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified” (requirements under the principle of equality; *Sermide*, 1984).
- Here:  
No comparability of situation required.

## HARASSMENT (5)

### Theoretical background

- Prof. Catharine A. MacKinnon (University of Michigan, USA).
- Ph.D. thesis (1979): *Sexual Harassment of Working Women. A case of Sex Discrimination*, New Haven/London: Yale University Press.
- Plea for a different approach to discrimination.
  - Not based on a requirement of comparability of the situation of women with that of men.
  - Decisive element: disadvantage/dominance.
- Reason: social realities.

## BRIEFLY: JUSTIFICATION (1)

- Prohibitions against discrimination may be subject to derogations.
- Harassment: justification not conceivable.
- In the case of indirect discrimination, “objective justification” as part of the definition (open category).
- For both direct and indirect discrimination, express derogations:
  - “Derogations” differ according to the type of discrimination.
  - In principle closed list and strict interpretation.
  - Debate: “derogations” in the proper sense of the word or rather another side of equality?

## BRIEFLY: JUSTIFICATION (2)

### Race Directive

- Genuine occupational requirements (Art. 4).
- Positive action (Art. 5).

### Employment Framework Directive

- Public security, public order and prevention of criminal offences, public health, rights and freedoms of others (Art. 2(5)).
- Genuine occupational requirements (Art. 4).
- Handicap: reasonable accommodation (Arts. 2(2)(b)(ii) and 5).
- Age: objective justification (Art. 6).
- Positive action (Art. 7).

## MINIMUM APPROACH

### An important principle under the Directives

- Directives provide for minimum requirements only!
- Relevant provisions:
  - Art. 6 Race Directive.
  - Art. 8 Employment Framework Directive.
- Two aspects:
  - No going below the status quo of national law.
  - More favourable national provisions are always possible.
- Thus: room for action for the Member States!
  - Wider definition of discrimination.
  - More limited provisions on justification.

## CONCLUSION

- Discrimination under EC law: a sophisticated concept.
- Traditional and non-traditional approaches.
- Within the traditional (comparison-based) approach:
  - Obvious and less obvious forms of discrimination (direct and indirect discrimination).
  - Reason: effectiveness of EC law.
- Plus in recognition of social realities: the non-traditional concept of harassment.