

The EC anti-discrimination directives 2000/43 & 2000/78 in practice

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Definitions of key concepts:

Direct discrimination

Indirect discrimination

Harassment

Prof. Marzia Barbera
University of Brescia



A new generation of antidiscrimination law

- Since the foundation of the EC, there were two extensive bodies of EC antidiscrimination law:
 - on the ground of **sex**
 - on the ground of **nationality**
- Starting from the Treaty of Amsterdam, EU law has extended the scope and depth of the antidiscrimination principle
- New grounds of 2000 Directives: **race, religion or belief, disability age, sexual orientation**
- In the field of **gender** discrimination three new directives



The legal background

The general antidiscrimination principle

- The principle of non-discrimination is a general principle of EU law, expressly mentioned in a number of provisions of the of the Treaties and of the Charter of Fundamental Rights of the European Union



The legal background

Direct effect of the antidiscrimination principle

The *Mangold* doctrine:

- The antidiscrimination principle must be regarded as a general principle of Community law
- Consequently, observance of the general principle of equal treatment cannot as such be conditional upon the expiry of the period allowed the Member States for the transposition of a directive intended to lay down a general framework for combating discrimination on the grounds of age,
- In those circumstances it is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law



The legal background

The EU Charter of Fundamental Rights

- The Charter of Fundamental Rights of the European Union brings together into a single text all the personal, civic, political, economic and social rights enjoyed by the citizens and residents of the European Union.
- The EU Council of Ministers, the presidents of the European Commission and the European Parliament proclaimed the Charter in December 2000 at an EU Summit in Nice and again in 2007, just before the signing of the Lisbon Treaty
- The Treaty of Lisbon signed on 13 December 2007 will give legally binding value to the Charter



The legal background

The EU Charter of Fundamental Rights:

The general non-discrimination principle

- **Article 21(1)** states:

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 shall be prohibited.'

The legal background

The EU Charter of Fundamental Rights : The sex antidiscrimination provisions

- **Article 23** states
 - Equality between men and women must be ensured in all areas, including employment, work and pay.
 - The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

The legal background

The EC Treaty: Article 13

- **Article 13** of the EC Treaty states:
 - 'Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'

The legal background

The EC Treaty: The provisions on sex discrimination

- **Article 2** of the EC Treaty provides that promotion of equality between men and women is a task of the European Community.
- **Article 3(2)** provides that it should aim to eliminate inequalities, and to promote equality, between men and women in all its activities (also known as "gender mainstreaming").
- There are three legal bases in the EC Treaty for EU legislation on equal treatment of men and women: **Article 141(3)** in matters of employment and occupation; **Article 13(1)** outside of the employment field; **Article 137** in the promotion of employment, improved living and working conditions.

A strategy to combat discrimination

Legislation

- **A multi- faceted strategy to combat discrimination:**
 - a) Legislation:**
 - A Directive to implement equal treatment irrespective of racial or ethnic origin (**Council Directive 2000/43/EC**)
 - A Directive establishing a framework for equal treatment in employment and occupation on the grounds of religion or belief, disability, age and sexual orientation (**Council Directive 2000/78/EC**)
 - A Directive implementing the principle of equal treatment between men and women in the access to and supply of goods and services (**Council Directive 2004/113/EC**)
 - A Directive implementing the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (**Directive 2006/54/EC of the European Parliament and of the Council – recast**)
 - **A Proposal of a new Directive** is under discussion, with the aim of enlarging the scope of the Framework Directive



A strategy to combat discrimination

Programs

b) Programs

- **The Community Action Programme 2001-2006** to combat discrimination on all the grounds listed in Article 13 (other than sex). The programme had three principal objectives:
 - to assist in analysing and evaluating the extent and nature of discrimination in the EU and the effectiveness of measures to combat it;
 - to help to build the capacity of the actors in the Member States of the EU and at European level who are active in the fight against discrimination;
 - to promote and disseminate to practitioners and opinion-formers the values and practices underlying the fight against discrimination.
- **The PROGRESS Programme 2007-2013** has brought together a number of existing European programmes under one heading, including the anti-discrimination programme.



Prohibition of discrimination

- The anti-discrimination Directives prohibit both **direct** and **indirect** discrimination, as well as other forms of discrimination : **harassment, instruction to discriminate.**
- They also prohibit **victimisation**
- The prohibited grounds are:
gender, race and ethnic origin, religion or belief, disability, age, sexual orientation



Defences

Two steps

- First step: the defendant has to prove that no different treatment or adverse impact occur (for example because the two situations are different)
- Second step: the defendant has to prove that different treatment or adverse impact is due to one of the exceptions or justifications provided for by the law



Defences

Genuine & determining occupational requirements

- Each situation has to be examined on its own merits because a general exception to the principle of equal treatment is not admissible
- In addition, Member States are obliged to periodically assess the exclusions in national law
- The provisions on churches and other public or private organisations based on ethos shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground

Defences

Genuine & determining occupational requirements

- In *Kreil* (C-285/98), which concerned the exclusion of women from almost all military posts of the military forces in the Federal Republic of Germany, the ECJ held that such an exclusion could only be justified by the specific nature of the posts in questions or by the particular context in which the activities in question were carried out
- A balancing test between **different treatment or particular disadvantage** and **legitimate aim**, according to a strict scrutiny (**necessity, not only objectivity**)
- The balance can change: compare *Mangold*, *Palacios del la Villa* and *National Council of Ageing*

Defences

Exceptions and justifications

- The Directives provide for certain narrowly and precisely drawn **exceptions** and **justifications**:
- **Positive actions**
- **Genuine occupational requirements**

- Plus specific exceptions for:
 - **Disability and age**
 - **Age discrimination**
 - **Churches and other organisations based on ethos; they may also require individuals working for them to act in good faith and with loyalty to the organisation's ethos.**
 - **Police service and teachers in Northern Ireland**



Material Scope I

- All the Directives prohibit discrimination in **employment**, defined as:
 - access to employment, self-employment and occupation
 - vocational guidance and training
 - employment and working conditions, including dismissals and pay
 - membership of organisations



Material Scope (II)

- The Race Directive also covers discrimination in:
 - **Education**
 - **Social protection, including social security and healthcare**
 - **Social advantages**
 - **Goods and services, including housing**



Material Scope (III)

- The Gender Directives also cover:
 - social security and occupational social security schemes
 - access to and supply of goods and services



Personal Scope

- The Directives apply to all persons
 - natural and legal
 - in the EU, regardless of nationality
 - in public & private sector
 - employed and self-employed



Direct discrimination

Definition

- **Not defined in the earliest legislation**
- **Today defined by the directives**
- **It** occurs if one person is treated **less favourably** than another is, has been or would be treated in a **comparable situation**, on **any of the grounds** on which discrimination is prohibited.



Direct discrimination

Less favourable treatment

- Action, omission and instruction to discriminate
- Past treatment
- Present treatment
- Hypothetical treatment
- Declarations or "Speech acts" (*Feryn*)



Direct discrimination

Grounds of discrimination

- No need of intention or subjective motive
- Discrimination by association, or transferred discrimination (*Coleman*).
- Discrimination because of perceived status (*Maruko*)
- Illness is not disability (*Chacón Navas*). Can the concept of disability adopted in the judgment be used outside the antidiscrimination field?
- The problem of national origin: excluded ground in Community law, included in most of national laws
- *Feryn*: a case of racial prejudice because of national origin?



Direct discrimination

Causal link

- Objective causal link (intention is not required)
 - Primary cause test ? (*but for test*)
- or**
- Sufficient cause test? (*the discrimination is prohibited whatsoever*)
 - How to prove it? Mainly by inferences



Direct discrimination

Comparable situation

- Actual, past (*Macarthys*) or hypothetical comparator
- Relevant circumstances: the same or not materially different
- Terms and conditions regulated by unifying legal source or common terms (*Lawrence, Allonby*)



Direct discrimination

Defences: Exceptions

- **Positive actions (as interpreted by ECJ in *Kalanke, Marshall, Badek et alia*)**
 - **Genuine occupational requirements**
 - **Specific exceptions for:**
 1. **Disability and age (Armed Forces)**
 2. **Age** (in social security and social protection scheme; as means of legitimate employment policy, labour market and vocational training objectives, or for admission or entitlement to retirement or invalidity benefits in occupational security scheme, as interpreted in *Mangold, Palacios de la Villa, National Council of Ageing*)
 3. **Churches and other organisations based on ethos**
 4. **Police service and teachers in Northern Ireland**



Direct discrimination

Are justifications admitted?

- Discrimination cannot be justified, indirect discrimination can be
- But there are exceptions to the prohibition of direct discrimination
- Is there a difference between exceptions and justifications?
- A different kind of control
(ex ante and ex post judgement; exhaustive and open list)



Direct discrimination

Some examples to be discussed

- a 40-year woman applies for a job as a shop assistant in a clothes store, but when she gets to the interview she is told that the firm only recruits people in their 20s.
- a Nigerian couple is looking for a new apartment to rent, but when they go to visit one they are told by the landlord that he cannot consider them as tenants as the neighbours would object to having black people in the apartment block
- a waiter is dismissed because does not comply with the order not to serve somebody because of her race
- a teacher who teaches religion education is dismissed
because is pregnant without being married



Indirect discrimination

Definition

- First defined by Directive 97/80/CE
- Indirect discrimination occurs where **an apparently neutral** provision, criterion or practice would put persons belonging to a protected group at a **particular disadvantage** compared with other persons.
- Unless the provision, criterion or practice in question is **objectively justified** by a **legitimate aim** and the means of achieving that aim are **appropriate and necessary**.



Indirect discrimination

Definition: Provision, criterion or practice

- No need of a deliberate specification of a requirement
- Can be a consequence of the way the business operates in practice



Indirect discrimination

Definition: Particular disadvantage

- The previous definition used the expression “*substantive higher proportion*”
- No clear what a “particular” disadvantage is (but see *O’Flynn*)
- No need for statistics (the problem of racial profiling)
- The *id quod plerumque accidit* rule applies



Indirect discrimination

Causal link

- **Potential discriminatory effect...:**
no need to be actually experienced
- **....of provisions or criteria**
no need for their actual application

Indirect discrimination

Defences

- **Positive actions**
- **Genuine occupational requirements**
- **Objective justification**
- **Appropriate measures as regards persons with a particular disability**

Indirect discrimination

Defences: Objective justification

- **Bilka- Kaufhaus test :**
 - Is the criterion imposed ***other than*** in order to discriminate?
 - Do the means selected to achieve the chosen aim correspond to a ***real and legitimate need?***
 - Are they ***appropriate*** to achieve that aim?
 - Are they ***necessary*** in order to achieve that aim?



Indirect discrimination

Defences: The special defence in disability cases

- **“Reasonable accommodation”**
- When an employer is faced with an allegation of unlawful discrimination against a disabled person, it is a defence to prove that reasonable accommodation has been provided for persons with the disability in question
- This means that employers must take *appropriate* measures to enable a person with a disability to be employed
- When a measure ceases to be reasonable (*Chacòn Navas*):
 1. When it is not tailored to the situation
 2. Where it imposes a “disproportionate burden” on the employer.



Indirect discrimination:

Some examples to be discussed

- an employer demands particular hours of work which are impossible for the adherents of certain religions...
...but the hours of work requirement was imposed because the factory had to operate continuously,
- particular language skills are demanded which members of certain ethnic groups cannot demonstrate...
...but the language requirement was imposed because the employee had to communicate effectively with customers
- a construction company insists that all workers on a dangerous building site wear safety hats; this would have a negative impact, for example, on Sikhs who are required to wear turbans....
..but because of the duty to comply with health and safety regulations the employer insists on imposing the requirement



Direct or indirect discrimination?

- When a provision or requirement is neutral on its face usually the case is reasoned by courts as an indirect discrimination case
- What about a criterion neutral on its face but that can put in disadvantage 100% of the individuals belonging to a protected group?
- It could be argued that this is a case of direct discrimination
- See *Schorbus* and *Dekker* for different solutions
- The case of the requirement of citizenship



Harassment

- Harassment is defined as an unwanted conduct related to the grounds on which discrimination is prohibited, with the **purpose** or **effect** of violating the dignity of a person **and** of creating an intimidating, hostile, degrading, humiliating or offensive environment (intended or not).
- The definition of harassment includes a wide range of unwanted conduct.
- When making an assessment of whether harassment has taken place, **a comparator does not need to be identified**

Other forms of unlawful conduct:

Instruction to discriminate

- It is considered as a form of discrimination and is prohibited.
- The prohibited act is the **instruction**, not the occurred discrimination
- There must be a **relationship of power**, when A is expected to follow the instruction from B

Other forms of unlawful conduct:

Victimisation

- The Member States need to put in place measures that are necessary to protect individuals from any adverse treatment (such as dismissal) as a reaction to:
 - Complaint of discrimination
 - Proceedings aimed at enforcing compliance of with the principle of equal treatment
- Protection is given not only to the person who has been discriminated against, but also to those who provide evidence as part of a discrimination complaint, or are involved in some other way in the complaint
- Can be considered a discrimination in itself?