

Anti-Discrimination Directives 2000/43 and 2000/78

Definition of Fundamental Concepts:

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Summary

- Introduction
- Direct discrimination
- Indirect discrimination
- Harassment

Introduction

Common notions

- **Formal equality**
 - Equality “before the law” or “on paper”
 - Equal treatment of equal situations
 - Linked to the concept of direct discrimination
- **Substantive equality**
 - Equality “in law” or “actual” equality
 - different treatment of different situations in order to achieve equality in practice
 - Linked to the concepts of indirect discrimination, positive discrimination and reasonable accommodation
- **Discrimination**
 - Application of different rules to comparable situations
 - Application of the same rule to different situations

Introduction

Prohibited grounds for discrimination

- **Directive 2000/43/EC (Art. 1)**
 - “Race”
 - Ethnic origin
- **Directive 2000/78/EC (Art. 1)**
 - Religion or beliefs
 - Disability (*sickness is not a disability and does not constitute a prohibited ground for discrimination: ruling of 11 July 2006, Chacón Navas, C-13/05*)
 - Age
 - Sexual orientation

Introduction

Material and personal scope

- **Cf. previous presentation**

Direct discrimination

General characteristics

- The most “intuitive” form of discrimination
- Discrimination openly founded on a prohibited ground (this factor is the essential or ultimate characteristic distinguishing direct from indirect discrimination)
- Similar situations must not be treated differently
- Individuals are protected in their own right
- Protection of formal equality

Direct discrimination

Legal definition

- No legal definition of direct discrimination existed until the two directives 2000/43 and 2000/78
- Prior to these, the concept was based on presupposition
- Art. 2 (2a):
 - 📖 *Where one person is treated less favourably than another is, has been or would be treated in a comparable situation on any of the prohibited grounds*

Direct discrimination

Constituent elements – (1) Treatment

- “*Less favourable*” treatment = different + negative
- Covers both action (even simple words) + omission

Hence ECJ ruling of 10/07/2008, **Feryn** ([C-54/07](#)):
simple discriminatory statements by the employer

- **Includes instruction to discriminate**

Article 2 (4):



“An instruction to discriminate against persons on any of the grounds referred to in Article 1 shall be deemed to be discrimination within the meaning of paragraph 1.”

Direct discrimination

Constituent elements – (2) Comparison

- **With a “comparable situation”**
 - ➔ No need to identify an *identical* situation
- **It may be an actual situation**
 - Present (“*is*”)
 - Past (“*has been*”)
- **Or a hypothetical situation**
 - “*would be*”
 - Very important option in the event that it is very difficult, if not impossible, to identify an actual comparison

Direct discrimination

Constituent elements – (3) Causality

- **Necessary condition**
 - Less favourable treatment must be “*on any of the grounds*” listed as prohibited.
 - It is not enough to prove difference of treatment: there must be proof that it was due to the prohibited ground.
- **Sufficient condition**
 - Objective concept: there is no need for an intention to discriminate.
 - What counts is that the less favourable treatment must be the “consequence” of the prohibited ground for discrimination.

Direct discrimination

Constituent elements – (3) Causality

- **Type of causality**
 - It is not clear what type of causality is required
 - Primary cause
 - the ground for discrimination is necessary or determining
 - Secondary cause
 - the ground for discrimination is one (and not the foremost) cause of less favourable treatment

Direct discrimination

Constituent elements – (3) Causality

- **Scope:** Includes discrimination
- **“By association”**
 - when the victim does not personally exhibit the discriminatory characteristic (for example, as a member of a specific “race” or minority sexual orientation), but has been treated unfavourably as a consequence of one of the prohibited grounds.

Hence the ECJ ruling of 17/07/2008, *Coleman* (C303/06).

The prohibition of direct discrimination on the ground of disability is not confined to individuals who themselves have a disability: applicable to a worker who experienced discrimination because of her son’s disability.

Direct discrimination

Constituent elements – (3) Causality

- **“By false supposition”**
 - when the discrimination is the result of a discriminatory ground although the victim does not actually have the characteristic concerned, and the person committing the discrimination has attributed it to the victim erroneously.

Hence ruling of 1 April 2008, *Maruko* (C-267/06)

National rules by virtue of which, following the death of a civil partner, the surviving partner is not granted a survivor's benefit equivalent to that received by a surviving spouse, although under national law civil partnership places same-sex couples in a comparable situation to that of married couples with regard to the survivor's benefit in question.

Direct discrimination

Justifications – (1) Admissibility?

- Some commentators on the two directives maintain that direct discrimination cannot ever be justified.
- It is true that, whereas the definition of indirect discrimination provides explicitly for an avenue of justification, nothing is said about this in the definition of direct discrimination.
- However, both directives contain specific provisions elsewhere addressing situations where direct discrimination is nevertheless admissible.
- These commentators prefer to talk of “derogations” or “exceptions” when describing such provisions. This approach fails to acknowledge that the two forms of discrimination, be they direct or indirect, are substantially identical.

Direct discrimination

Justifications – Admissibility?

- **Direct discrimination:**
“numerus clausus”
 - The only justifications admitted are those for which the directives provide.
 - Restrictive interpretation of the logic underlying such justifications.
- **Indirect discrimination:**
“numerus apertus”
 - Any justification can be admitted as long as it meets the general conditions described.

Direct discrimination

Justifications – General framework

- **Justifications common to both directives**
 - a) Genuine and determining occupational requirements
 - b) Positive action
- **Additional justifications specific to Directive 2000/78/EC**
 - a) Disability and age: armed forces
 - b) Religion and beliefs: specific, previously existing, genuine occupational requirements
 - c) Age: legitimate objectives associated with employment and social security policies
 - d) Religion: provisions specific to Northern Ireland (police officers and teachers)

Direct discrimination

Justifications common to both directives

a) Genuine and determining occupational requirements

- Art. 4 D 2000/43 and Art. 4 (1) D 2000/78:



*Member States may provide that a difference of treatment which is based on a characteristic related to racial or ethnic origin shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a **genuine** and **determining** occupational requirement, provided that the objective is legitimate and the requirement is proportionate.*

Direct discrimination

Justifications common to both directives

- Genuine + determining + occupational requirement
- **Limits:** legitimate objective (not in itself discriminatory) + proportionality
- **Examples:**
 - requirement for a black actor to play *Othello* in a film;
 - requirement for a person without a physical disability to be employed as a professional footballer.

Direct discrimination

Justifications common to both directives

b) Positive action

- Art. 5 D 2000/43 and Art. 7 (1) D 2000/78:

 *With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the prohibited grounds.*

- **Example:** measures favouring recruitment of members of an ethnic minority.

Direct discrimination

Justifications common to both directives

- ECJ case-law
 - Highly restrictive towards positive measures:
 - Rulings of 17/10/1995, *Kalanke* (C-450/93); 28/03/2000, *Badeck et al.* (C-158/97); 6/07/2000, *Abrahamsson and Anderson* (C-407/98); 19/03/2002, *Lommers* (C-476/99); 30/09/2004, *Briheche* (C-319/03)
 - In substance:
 - Automatic, unconditional priority for members of the disadvantaged group is inadmissible + proportionality is required

Direct discrimination

Additional justifications in D 2000/78

a) Disability and age

- Option not to apply the directive within the armed forces (Art. 3 (4))

Direct discrimination

Additional justifications in D 2000/78 – religion and beliefs

b) Religion and beliefs: specific, previously existing genuine occupational requirements (Art. 4 (2))



“Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which,



in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief,



a difference of treatment based on a person’s religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person’s religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation’s ethos.

Direct discrimination

Additional justifications in D 2000/78 – religion and beliefs

- 📖 This difference of treatment 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.
 - 📖 Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.”
- A highly complex provision, difficult to interpret.

Direct discrimination

Additional justifications – Age: employment policy

c) Age: legitimate objectives linked to employment policy (Art. 6 (1))

- Differences in treatment are admitted (Art. 6 (1), first sentence)
 - 📖 “(...) Member States may provide that differences of treatment on grounds of age shall not constitute discrimination (...)”
- Conditions for admitting such differences (Art. 6 (1), first sentence, proviso):
 - 📖 “(...) if, within the context of national law, they are objectively and reasonably justified by a aim, including legitimate employment policy, labour market and vocational training objectives (...)” **[objective justification]**
 - 📖 “(...) and if the means of achieving that aim are appropriate and necessary” **[proportionality]**

Direct discrimination

Additional justifications – Age: employment policy

- **Examples of admissible differences in treatment (Art. 6 (1), second sentence)**
 - Non-exhaustive list of admissible differences in treatment (“Such differences of treatment may include, among others”):
 - **Special conditions**
 - 📖 *“a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;”*
 - **Thresholds**
 - 📖 *“b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;”*
 - **Caps**
 - 📖 *“c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.”*

Direct discrimination

Additional justifications – Age: employment policy

- **ECJ ruling of 22/11/2005, Mangold (C-144/04)**
 - Domestic rules authorise, without restriction, the conclusion of fixed-term employment contracts once a worker has reached the age of 52, unless there is a close connection with a previous employment contract of indefinite duration held with the same employer.
 - **Legitimate objective:** to promote the integration of older unemployed workers into the labour force.
 - **Lack of proportionality:** It was not demonstrated that fixing a minimum age in itself, regardless of any other consideration linked to the structure of the labour market concerned or the personal situation of the individual concerned, was objectively necessary to achieving this objective.

Direct discrimination

Additional justifications – Age: employment policy

- **ECJ Ruling of 16/10/2007, Palacios de la Villa (C-411/05)**
 - Collective agreement stipulating automatic termination of employment when a worker reaches the age of 65 and is entitled to a retirement pension.
 - Difference of treatment founded directly on age.
 - **Legitimate objective:** Even if implicit, promoting access to employment by distributing it more effectively between generations.
 - **Proportionality:** Account is taken of the circumstance that the person concerned is entitled to an adequate retirement pension.

Direct discrimination

Additional justifications – Age: employment policy

- **ECJ ruling of 05/03/2009, Age Concern England (C-388/07)**
 - The British transposition law provides that workers who have reached the age of 65 may be dismissed without this being regarded as discrimination.
 - Difference of treatment founded directly on age (§34).
 - **Legitimate objective:** *a priori* achievement of social policy objectives. No requirement for a list of exceptions. To be reviewed by the national judge.
 - An objective justification that is achieved by appropriate and necessary means must also be understood as **reasonable** (same meaning in Articles 2 (2) and 6 (1))

Direct discrimination

Additional justifications – Age: social security

c) Age: legitimate objectives linked to social security policy (Art. 6 (2))

- Differences in treatment are admitted:
 - 📖 *“Member States may provide that the fixing for occupational social security schemes of ages (...) does not constitute discrimination on the grounds of age”*
- The admissibility is subject to conditions:
 - 📖 *“(...) provided this does not result in discrimination on the grounds of sex.”*

Direct discrimination

Additional justifications – Age: social security

- **Exhaustive list (?) of admissible differences in treatment:**
 - **Thresholds (and caps?)**
 - 📖 *“(...) the fixing (...) of ages for admission or entitlement to retirement or invalidity benefits”*
 - **Special conditions**
 - 📖 *“(...) including the fixing under those schemes of different ages for employees or groups or categories of employees”*
 - **Actuarial calculations**
 - 📖 *“(...) and the use, in the context of such schemes, of age criteria”*

Indirect discrimination

General characteristics

- **Origin in case-law**

- ECJ rulings of 15 October 1969, *Ugliola* (15-69) and 12 February 1974, *Sotgiu* (152-73)
- To avoid the limitations of exercising the concept of direct discrimination
- Inclusion of “non-apparent” or “covert” discrimination: difference in treatment based *prima facie* on a ground that is not prohibited by law but which, in practice, produces the same prohibited result

Indirect discrimination

General characteristics

- **“Symmetry” with the concept of direct discrimination**
 - Different situations must not be treated in the same way
 - Protection for groups
 - Substantive equality is taken into account

Indirect discrimination

Integration of the concept into positive law

● **Explicit references as from 1976**

- Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (Art. 2 (1)):



“For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.”

Indirect discrimination

Integration of the concept into positive law

- **Definition as from 1997**

- Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex (Art. 2 (2)):



“For purposes of the principle of equal treatment referred to in paragraph 1, indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.”

Indirect discrimination

Integration of the concept into positive law

- **Legal definition (Art. 2 (2 b) of the directives)**



Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin [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, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Indirect discrimination

Constituent elements – (1) Origin

- **Origin of the discrimination**

- 📖 *“Provision, criterion or practice”*

- Deliberately broad wording in an attempt to include all the various possibilities
 - **Formal origin:** provision, criterion
 - **Informal origin:** simple practice

Indirect discrimination

Constituent elements – (2) Form

- **Form: apparently neutral**
 - *This is the distinguishing hallmark of the concept of “indirect discrimination”*
 - *If the difference of treatment is explicitly based on a prohibited ground, then → direct discrimination*
 - *Appreciation fraught with difficulties in practice. Case-law not always coherent.*

Indirect discrimination

Constituent elements – (2) Form

- In most cases, discrimination apparently based on a ground other than those which are prohibited is considered to be indirect discrimination, even if the ground formally invoked is in substance equivalent to one of the prohibited grounds.
- Hence the ruling of 7 December 2000, *Schnorbus (C-79/99)*: difference of treatment based on completing military or alternative service considered to be indirect discrimination, even if this service can only be performed by men.
- By contrast, the ruling of 8 November 1990, *Dekker (C-177/88)*: discrimination due to pregnancy considered to be direct discrimination based on sex.

Indirect discrimination

Constituent elements – (3) Causality

- **Causality: “would put at a disadvantage”**
 - The causal relationship “discriminatory practice – discriminatory effect” may be:
 - **Real:** if the discriminatory practice produced the discriminatory effect.
 - **Potential:** if the discriminatory practice might produce the said effect even though it has not yet done so.
 - Broadens the field of protection compared with earlier case-law and legislation, which always required the discriminatory effect to occur in reality.

Indirect discrimination

Constituent elements – (4) Effects

- **Discriminatory effects**



Particular disadvantage for persons belonging to a specific group

- Major difference compared with the definition in the case-law and in other, earlier directives.
- Desire to facilitate proof of indirect discrimination and to expand the terrain of what is regarded as indirect discrimination.

Indirect discrimination

Constituent elements – (4) Effects

- **“Classical” concept**
 - Earlier directives and case-law required the discriminatory provision or practice to “*affect a substantially higher proportion of persons*” in one group than in another group.
 - The wording directly targeted differences of treatment between groups.
 - This called for the provision of statistical evidence.

Indirect discrimination

Constituent elements – (4) Effects

- **New approach in Directives 2000/43 and 2000/78**
 - **Shift in perspective:** account is taken not only of groups but also of individuals in their own right.
 - 📖 Particular disadvantage for “*persons*” in a specific group.
 - The definition of the groups concerned is based on one (or more) of the criteria used to prohibit direct discrimination (race, ethnic origin, religion, beliefs, etc.)

Indirect discrimination

Constituent elements – (4) Effects

- There is consequently no need to provide statistical evidence of the discriminatory effect on the group.
 - It is enough to prove the particular disadvantage suffered by one or more persons in this group.
-  The 15th recital of the two directives provides that *“indirect discrimination may be established by any means including on the basis of statistical evidence”*.

Indirect discrimination

Constituent elements – (5) No justification

- **No justification**
 - If the provision, criterion or practice producing the particular disadvantage is defended on the basis of a motive other than membership of the group (examined below), there is no indirect discrimination.
 - In a case such as this, the difference of treatment actually turns out to be based on a ground other than the prohibited grounds for discrimination.

Indirect discrimination

Justifications

- **General justifications applying to all types of indirect discrimination**
 - Article 2 (2 b) of the Directive provides that there may be justifications that rule out a conclusion of indirect discrimination:
 - 📖 *“unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”.*

Indirect discrimination

Justifications

- The conditions for admitting the justification are: **legitimate aim + proportionality** of means (appropriate and necessary).
- Open system or “numerus apertus”.
- Importance of judicial weighing up in any proceedings.

Indirect discrimination

Justifications

- **Specific justifications for persons with a disability**
 - Article 2 (2 b ii) of Directive 2000/78 provides, in cryptic wording, for an additional justification applying to persons with a disability:
 - 📖 “*unless:*
(...)
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.”

Indirect discrimination

Justifications

- To understand this justification, we must read Article 2 (2 b ii) in conjunction with Article 5 on reasonable accommodation:
 - *The employer is not obliged to take appropriate measures to assist persons with a disability and is consequently not discriminating against them if these measures are not “reasonable” because they constitute a “disproportionate burden”.*

Indirect discrimination

Justifications

- ***Applying the justifications formulated for direct discrimination***
 - *The justifications formulated in relation to direct discrimination apply “a fortiori” to cases of indirect discrimination.*
 - *Hence, even if the particular disadvantage is attributed to membership of a protected group (and thereby to a prohibited ground for discrimination) and is equivalent to direct discrimination, we must then consider whether this particular disadvantage might be defended by one of the justifications formulated in relation to direct discrimination.*

Harassment

Concept – Origin in case-law

- **Concept of sexual harassment in the rules for staff of the European institutions**

- Ruling of the Court of First Instance on 26/01/1995, *D v. Commission* (T-549/93)



Conduct with a sexual connotation or based on sex, regarded as unwelcome by the person at whom it is directed, and which must create a climate of intimidation, hostility or humiliation for the person at whom it is directed or be presented to that person as necessarily being to his or her professional advantage or disadvantage, depending on whether she accepts or rejects it. For sexual harassment to be established, it is not necessary for the victim to show clearly that it was unwelcome, this requirement only being raised when the facts to which objection has been made relate merely to a simple expression of sexual interest.

Harassment

Concept – EC Staff Regulations

- **Included in Art. 12a of the EC Staff Regulations, which adds “psychological” harassment:**
 - Psychological harassment:
 - 📖 “(...) any improper conduct that takes place over a period, is repetitive or systematic and involves physical behaviour, spoken or written language, gestures or other acts that are intentional and that may undermine the personality, dignity or physical or psychological integrity of any person.”
 - Sexual harassment:
 - 📖 “(...) conduct relating to sex which is unwanted by the person to whom it is directed and which has the purpose or effect of offending that person or creating an intimidating, hostile, offensive or disturbing environment. Sexual harassment shall be treated as discrimination based on gender.”

Harassment

Concept – Directives 2000/43 et 2000/78

- **Art. 1 (3):**



“Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 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.”