Overview

Outline of this presentation
• The function of key legal concepts
• 4 forms of discrimination in contemporary EU law
• The concepts relevant to this presentation:
  – Direct discrimination
  – Indirect discrimination
  – Harassment

Note:
The charts to which this presentation refers can be found in the publication: Christa Tobler, Limits and potential of the concept of indirect discrimination (for the European Commission), Luxembourg: Office for Official Publications of the European Communities 2008
The Function of Key Legal Concepts (1)

For prohibitions of discrimination in particular

• Key legal concepts define the content of a provision and are therefore crucial to understanding the provision concerned.
• In the case of prohibitions of discrimination, the key concepts are typically related to three aspects:
  – The scope of the provision
  – The concept of discrimination

See Chart 2.

The Function of Key Legal Concepts (2)

An example: Article 45 TFEU

• (2): “abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment”
• (3): “subject to limitations justified on grounds of public policy, public security or public health”
• (4): “shall not apply to employment in the public service”
The Function of Key Legal Concepts (3)

The relevant concepts

- The concepts of “direct”/“indirect discrimination” and “harassment” relate to the concept of discrimination (level 2 of the analysis).
- In more recent directives, they are enshrined in the form of specific articles (legal definitions as an exception in EU law).
- They constitute 3 of altogether 4 forms of discrimination in the latest generation of EU anti-discrimination law.

4 Forms of Discrimination in Contemporary EU Law (1)

Evolution: direct/indirect discrimination

- Originally:
  - The Court of Justice interpreted the substantive prohibitions on discrimination in the EEC Treaty in one way: they prohibited unequal treatment based explicitly on the criterion contained in the Treaty provision.
  - This is partially echoed in the current concept of direct discrimination.
- Later:
  - The Court of Justice developed an additional legal concept: indirect discrimination (discrimination formally founded on another criterion).
4 Forms of Discrimination in Contemporary EU Law (2)

Secondary EU legislation
- Secondary law makes some references to direct and indirect discrimination (internal market legislation, social legislation).
- From 2000 onwards, a new generation of directives:
  - Direct discrimination
  - Indirect discrimination
  - Harassment
  - Instruction to discriminate.

See Chart 4.

4 Forms of Discrimination in Contemporary EU Law (3)

Relevant legislation
- Directive 2000/43/EC (race and ethnic origin)
- Directive 2000/78/EC (religion or belief, disability, age, sexual orientation)
- Directive 2004/113/EC (sex equality: services)
- Directive 2006/54/EC (sex equality: recast)
- Directive 2010/41/EC (sex equality: self-employed)

- However not other legislation, e.g.:
  - Internal market legislation (commercial law)
  - Directive 79/7/EEC (sex equality: state social insurance)
  - Charter of Fundamental Rights
Direct Discrimination (1)

A simple concept at first glance…

• The Court’s definition in *Dekker*:
  “[… ] depends on whether the fundamental reason for
the refusal of employment is one which applies without
distinction to workers of either sex or, conversely,
whether it applies exclusively to one sex”.

• Here:
  – Pregnancy as a reason for not recruiting a job applicant.
  – CJEU sees this as direct discrimination because only women
can be pregnant.

• Cf. earlier case-law in the United States.

Direct Discrimination (2)

Legal definition

• Legal definition:
  e.g. according to Article 1(2)(a) Directive 2000/43/EC
  “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”.

• Unless justification is provided; see **Chart 6**.

• Seems easy – focus on whether the prohibited criterion
was applied. However, in recent practice, it has not
been all that easy (more to follow).
Direct Discrimination (3)

Some examples (1)
- A historical example described by Elizabeth von Arnim (in her novel “Elizabeth and Her German Garden” of 1875):
  - She is talking about the wages of day labourers on the estate belonging to the author’s husband.
  - “[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.”
- CJEU case-law: fairly rare, except in the case of age discrimination.

Direct Discrimination (4)

Some examples (2): Feryn
- Concerns ethnic discrimination.
- The director of a Belgian company that installed security equipment said in public that he did not employ foreigners, notably Moroccans.
- An advocacy association took him to court.
- CJEU:
  - This is a case of direct discrimination (“speech act”) as it is “clearly likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market. The existence of such direct discrimination is not dependant on the identification of a complainant who claims to have been the victim."
  - (no comments about justifications).
Direct Discrimination (5)

Some examples (3): Prigge

• Concerns age discrimination.
• The German airline Lufthansa dismisses pilots when they turn 60 (automatic; collective agreement).
• Three pilots affected by this take the company to court.
• CJEU:
  – This is direct discrimination on grounds of age: “Such a pilot is in a comparable situation to that of a younger pilot performing the same activity for the benefit of the same airline company and/or falling under the same collective agreement. The first pilot whose employment contract terminates automatically when he attains 60 years of age is treated in a less favourable manner, on grounds of his age, than the second.”
  – According to the CJEU, there is no justification.

Direct Discrimination (6)

Some examples (4): Prigge (justification)

• Theoretically, three justifications are conceivable.
• None applies in the case before the Court:
  – Neither Article 2(5) (public security, in this instance air traffic safety): it is not necessary to prohibit piloting (it would suffice merely to restrain activities).
  – Nor Article 4(1) (characteristic related to any of the grounds referred to in Article 1 of Directive 2000/78 and constituting a “genuine and determining” occupational requirement): disproportionate age limit.
  – Nor Article 6(1) (legitimate aim, in particular legitimate employment policy or labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary): only social policy objectives, which are not at issue here.
Indirect Discrimination (1)

For less obvious cases

• Landmark judgments Sotgiu, Bilka, O’Flynn.
• Legal definition, e.g. according to Article 1(2)(b) Directive 2000/43/EC “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”.

See Chart 5.

Indirect Discrimination (2)

Some examples

• One example from personal observation:
  – Visit to the famous Castelo do Saõ Jorge, where residents of Lisbon do not need to pay for admission.

• CJEU case-law, landmark judgment in O’Flynn:
  – UK provision whereby a means-tested social payment can be made towards funeral expenses for a family member.
  – Condition: the funeral must take place in the UK.
  – No justification.
How to Distinguish

Boundary shift
- Example Maruko (cf. also Nikoloudi):
  - The surviving partner of a registered same-sex partnership in Germany (D) is not granted a widower’s pension because he was not married to his partner.
  - In D only heterosexual couples can marry.
- Indirect discrimination on the ground of sexual orientation?
- CJEU: direct discrimination – no detailed explanation (presumably because the German provision excludes all homosexual persons).

See Chart 7.

Comparability

Aristotelian approach in both cases?
- Background – general definition applied by CJEU, e.g. in C-253/09 Commission versus Hungary, recital 50: “it is settled case-law that discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations [...]”
- Legal definition of direct and indirect discrimination:
  - Clearly applies to direct discrimination; see wording of definition.
  - Does it also apply to indirect discrimination? Disputed; again, see wording.
Harassment (1)

A new element

- Clearly not the Aristotelian approach.
- Article 1(2)(c) Directive 2000/43/EC:
  “Harassment shall be deemed to be discrimination within the meaning of paragraph 1, 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. […]”
- Background: work done in the United States by Catherine MacKinnon from the 1970s onwards.

Harassment (2)

Examples (1)

- Practically no case-law from the CJEU.
- First questions raised in *Coleman*.
  - “Constructive” dismissal of a worker is ultimately due to her son’s severe disability.
  - Core issue: discrimination by association, including harassment aspect (insulting comments made by her employer).
  - CJEU: “Where it is established that the unwanted conduct amounting to harassment which is suffered by an employee who is not himself disabled is related to the disability of his child, whose care is provided primarily by that employee, such conduct is contrary to the […] prohibition of harassment […].”
Harassment (2)

Examples (2)
- Recent question in the case of Berlov, which the CJEU did not address on the merits for lack of jurisdiction.
  - Installation of electricity meters at a height of 7 metres (too high to read) in neighbourhoods predominantly inhabited by Roma.
  - The Commission for Protection Against Discrimination addressed a reference for a preliminary ruling to the CJEU.
  - CJEU: No legitimation in this case since it is not a judicial body.
- Cf. in addition the case-law on rules governing the EU’s own public service, which among other things explicitly forbid bullying (‘psychological harassment’).

Harassment (2)

Examples (3)
- (still in relation to rules governing EU staff)
- E.g. in F-52/05:
  - Accusations inter alia about isolation from other offices, avoiding discussion, no assignment of tasks, spreading defamatory rumours.
  - Art. 12a (3) of the Staff Regulations: “Psychological harassment’ means 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.”
  - CJEU: no malicious intention necessary; emphasis is on repetition.
A Note on Proof

Reversal of the burden of proof

• e.g. Article 8 Directive 2000/43/EC:
  – “when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination …”
  – “… it shall be for the respondent to prove that there has been no breach of the principle of equal treatment”.
• Note: this needs to be distinguished from the definition of discrimination!
• e.g. Feryn, where part of the question was related to this aspect.

Finally

Thank you for your attention!

Contact:

r.c.tobler@law.leidenuniv.nl or christa.tobler@law.leidenuniv.nl

For the Charts: www.eur-charts.eu