

ERA CONFERENCE  
APPLYING EU ANTI-DISCRIMINATION LAW  
TRIER, 8-9 DECEMBER 2014

Overview of the existing EU legislation  
on equality and definition of key  
concepts:  
direct discrimination,  
indirect discrimination  
harassment

Prof. Marzia Barbera  
Department of Law - University of Brescia



## Outline

- Which rationale for EU antidiscrimination law?
- A new generation of antidiscrimination law
- Why we need a shared concept of discrimination
- The key concepts:
  - Material and personal scope
  - Forms of discrimination:
    - ❖ Direct Discrimination
    - ❖ Indirect Discrimination
    - ❖ Harassment
  - Exceptions and justifications
  - The protected groups
  - Other forms of unlawful conduct



## Which rationale for EU antidiscrimination law?

### The economic rationale

- The principle of non-discrimination is a general principle of EU law, expressly mentioned in a number of provisions of the Treaties
- Banning discrimination is a necessary complement to the economic project of creating an internal market
- Even an arbitrary difference in treatment of comparable industrial sectors could vitiate the legality of Community law, as long as there is an identifiable source of discrimination.



3

## The prohibition of discrimination in employment and in the area of free movement in the EC Treaty

- Art. 119 (now Art. 157): prohibition of wage discrimination between men and women
- Articles. 6 and 48 (now Articles. 18 and 45): prohibition of discrimination on grounds of nationality
- These prohibitions, with horizontal direct effect, have a functional origin: they were indented to promote the proper functioning of the common market



4

## A different frame: the antidiscrimination principle as an expression of a general principle of equality....

- Gradually the Court has interpreted the right not to be discriminated against as a fundamental right
- **The first step:** the prohibitions are read as particular expressions of a general principle of equality which, though not explicitly enshrined in the Treaties, is a fundamental principle of Community law (see eg., *Bershar v. Bundesversicherungsanstalt für Angestellte case C-810/79* )



5

## ...and as a fundamental human right...

- **The second step:** the ECJ's recognition that the principle of equality set out in article 157 TFEU enshrines a fundamental right: "*the economic aim...is secondary to the social aim...which constitutes the expression of a fundamental human right*" (*Defrenne II Case 43/75*)
- See also *P. Case C-13-94 ; Test Achats Case 236/09*



6

## ....having a direct horizontal effect?

- **The third controversial step** : in *Mangold case C- 144/04* the Court interpreted the specific prohibition of age discrimination enshrined in the new Framework Directive as an expression of a general equality principle which is to be considered a general principle of Community law. The source of this principle is to be found in various international instruments and in the constitutional traditions common to Member States
- As a consequence, the Framework Directive applied even though it had not yet been transposed
- Direct horizontal effect of the principle? A more cautious approach in recent decisions (*Bartsch case C-427/06* and *Küçükdeveci case C-555/97*)



7

## The role of art. 21 of the EU Charter

- However, in *Association de Mediation Sociale case C-176/12*, relying on the EU Charter, the ECJ maintains that the principle of non-discrimination on grounds of age laid down in Article 21(1) of the Charter, is "*sufficient in itself to confer on individuals an individual right which they may invoke as such*".



8

## A new generation of antidiscrimination law

- Starting from the Treaty of Amsterdam, EU law has extended the scope and the depth of the antidiscrimination principle
- Art. 13 (now 19) TFEU: the EU has the competence to “take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”
- Art. 21 EU Charter of Fundamental Rights
- A legal basis for a new generation of antidiscrimination directives.



9

## The Equality Directives

- Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of **racial or ethnic origin**
- Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (prohibited grounds: **religion or belief, disability, age, sexual orientation**)
- Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment **of men and women** in matters of employment and occupation (recast)
- Directive 2010/41/EC on the application of the principle of equal treatment between **men and women** in an activity in a self-employed capacity
- Directive 2004/113/EC implementing the principle of equal treatment between **men and women** in the access to and supply of goods and services



## The definitions are the same, the protections differentiated

- The concepts of direct discrimination, indirect discrimination, harassment and instruction to discriminate are common to the various directives
- The protections continue to be partially different (e.g. different scope, varying number of exceptions)



## Why we need a shared concept of discrimination

- A new concept of discrimination in the legislation following art. 13 (now 19) of TFEU, focused not only on equality but also on difference between individuals and group
- Speaking the same language can avoid jeopardizing the protection from discrimination
- What must be defined:
  - Constitutive elements of the notions of discrimination
  - Protected groups



## Continuity and innovation

- The definitions reflect ECJ case law and are influenced by North-American experience (disparate impact theory) and by international law (objective notion of discrimination, no relevance of intention)
- But they also present original and innovative features (e.g. qualitative notion of indirect discrimination)
- A new doctrine on discrimination still on the way



## The key concepts

### 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



## Reducing the impact of the Directives by reducing their material scope

- *Runevic-Vardyn Case C-391/09*

The refusal by the Lithuanian authorities to use a person's national language of origin (in this case Polish) in documents of civil status is not a discrimination on the ground of racial or ethnic origin because it did not constitute a "service".



## Personal Scope

- The Directives apply to all persons - natural and legal - in the EU, **regardless** of their nationality (but not **on the ground** of their nationality): from *Feryn case C-54/07* to *Kamberaj case C-571/10*. Nationality as a case of race indirect discrimination?
- To public & private employers (but they are also liable for conducts of stakeholders who present themselves as having a leading role in the organization and are perceived as having such a role - *Asociația Accept case C-81/12*)
- To employees but also to self-employed



## Definitions of discrimination

- The anti-discrimination Directives prohibit both **direct** and **indirect** discrimination, as well as **harassment** - and provide the same definition of discrimination
- The Directives also make unlawful **instruction to discriminate** (deemed to be discrimination) and **victimization**



## Direct discrimination

- **Direct discrimination** occurs if one person is 1) **treated less favourably** than 2) **another is, has been or would be** treated in a **comparable situation**, 3) on **any of the grounds** on which discrimination is prohibited.
- The Directives provide for certain narrowly drawn **exceptions**, including genuine occupational requirements, positive action, specified exceptions for age discrimination and religion discrimination, armed forces (for age and disability only)



## Constitutive elements

- Differential (and *negative*) treatment
- Comparison
- Causal link
- Exceptions



## Differential (negative) treatment

- Action or inaction
- Individual or collective
- Treatment vs. Intention
- With or without an identifiable victim
- Simple statement: "Speech acts" (*Feryn case C-54/07*)



## Comparison

Where one person

- is (present concrete circumstances)
- has been (successive concrete circumstances, compared to a past circumstance)
- would be (hypothetical circumstances)

treated less favourably than another in a comparable situation



## The “importance of being comparable”

- Some times no comparator is required:  
*Dekker case C-177/88*
- Some times no comparator is found:  
*Z. case C-363 12*
- Some times courts disagree on terms of comparison: *Hay case C-267/12*



23

## Causal link: “on the ground of”

- Causative role of the protected ground
- Objective causality : subjective intent is not determinative
- It refers to the **characteristics themselves** not to the subject who posses one of them : *Coleman case C-303/06*
- Cause necessary but also decisive or rather co-determining? (“any discrimination whatsoever” ).



## Exceptions

- In principle no justification is admissible
- There are some exceptions to the principle, authorized by the law:

### General exceptions

- Genuine occupational requirements
- Positive action
- Public security, public order, public health and protection of rights and freedoms of others

### Ground-specific exceptions

- Age
- Churches and other organisations based on ethos
- Armed forces
- Unacceptable justification: the market (alone), the client's taste



## Genuine & determining occupational requirement

- Each situation has to be examined on its own merits because a *general* exception to the principle of equal treatment is not admissible and any exception must be proportionate
- In *Sirdar case C-273/97* the refusal to employ a woman as a chef in the UK Royal Marines was deemed to be compatible with Community law since all marine members had to be capable of combat and there was a ban on combat for women.
- But subsequently in *Kreil case C-285/98*, German legislation *generally* barring women from military posts involving the use of arms was deemed to be contrary to Community law; such an exclusion could be justified by the **specific nature of the posts** in question or by the **particular context** in which the activities in question were carried out



## Ground specific exceptions:

### 1. Age discrimination

- Article 6 of the Framework Directive provides:  
 “Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including **legitimate employment policy, labour market and vocational training objectives**, and if the means of achieving that aim are appropriate and necessary.”



## Ground specific exceptions

### 2. Religion and belief.

- Article 4.2. provides that a state may maintain national legislation pursuant to which a difference of treatment based on a person's religion or belief shall not constitute discrimination
- (a) if it relates to occupational activities within: i. churches or ii. other public organisations or private organisations (if the ethos of these organisations is based on religion or belief) and
- (b) by reason of the nature of those occupational activities (or the context in which they are carried out) a person's religion or belief constitutes a genuine occupational requirement
- (c) The difference of treatment should not justify discrimination on another ground.



## Indirect discrimination

- Indirect discrimination occurs where 1) **an apparently neutral** provision, criterion or practice would put 2) **persons** belonging to a protected group at 3) a **particular disadvantage** compared with other persons.
- 4) 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.



## Constitutive Elements

- Apparently neutral treatment
- Different impact (particular disadvantage)
- Comparison
- Causal link
- Justifications



## Apparently neutral treatment or criteria

- Examples
  - Seniority, experience: age
  - Organisation of working time, clothing: religion
  - Knowledge of language, selection procedure: race, ethnicity



## Particular disadvantage

- Directive 97/80 on the burden of proof: “a substantially higher proportion of the members of one sex” (*Bilka Kaufhaus* formula: 80% or more of the group placed at a disadvantage consisted of women)
- ECJ case law: in *Allué and Coonan case 33/88* the Court relied upon 64% of foreign language assistants disproportionately affected by the measures to find that the measures in question constituted unlawful discrimination
- Departure from statistical analysis : difficulties in identifying reference groups and statistically significant pools (*O’Flynn case C-237/94*)



## Comparison

- A prior condition for the enactment of anti-discrimination legislation is the awareness that there exists structural discrimination against certain groups
- In current EU law indirect discrimination occurs where a provision contains **a risk** that it will be disadvantageous to persons belonging to the protected ground
- It can therefore suffice for just one individual to be wronged in practice, for prohibited discrimination to be shown to exist (see *O'Flynn case*)
- From groups comparison to individual comparison?



## Causal link

- Potential impact (would put): is likely to cause particular disadvantage
- The causal link must be adequate, eg. likely to lead to that particular result, according to a criterion of foreseeability
- For example, in several ECJ cases concerning alleged indirect discrimination as a consequence of residence conditions common sense (what happens in practice) suffices to establish potential indirect discrimination ( see *O'Flynn case*)



## Justifications

Not all differences of impact are unlawful: “unless”

Objective justification :Bilka Kaufhaus test

- Is the criterion or rule imposed **other than** in order to discriminate?
- Do the chosen criterion or rule correspond to a **real need**?
- Are they **appropriate** to achieve that aim?
- Are they **necessary** in order to achieve that aim?

Cost alone may not justify



## The special justification 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 (appropriate measures) has been provided (or can be provided on request) for persons with the disability in question.
- Measures cease to be “**appropriate**” where they impose a “**disproportionate burden**” on the employer
- A reduction in working hours may be regarded as an accommodation measure which the employer must take in order to enable a person with a disability to work (*Ring and Skouboe Werge Joined Cases C-335/11 and C-337/11*)
- Member States must create **an obligation** for employers to adopt effective and practical measures (*Commission v. Italy Case C-312/11*)



## A gray area

- The difference between direct and indirect discrimination can be blurred whenever a criterion only affects a protected group or is inseparable from the protected ground : es. pregnancy, sex change, same sex marriage



37

## Harassment

- **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 focus here is wholly on the capacity of the conduct to violate human dignity, without the need to establish a comparison with the situation of other persons or to prove intention .
- In case law on mobbing the focus is on repetition. Does it apply to harassment based on specific grounds?
- The unwanted conduct can be rejected or suffered



## Sexual harassment

- Where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment
- Two kind of unlawful conducts:
  - Hostile environment harassment (all grounds)
  - Quid pro quo harassment (most often sexual in nature)



## Protected groups

Multiple (or intersectional) discrimination (direct or indirect)

- A person experiences multiple discrimination when more than one ground is involved (especially women: Directives 2000/43 recital 14 and 2000/78 recital 3)
- A critique of intersectionality: too complex to be useful in practical cases
- An appraisal of intersectionality: likely to strengthen equal treatment insofar as those most often affected are women



## The refusal to enlarge the number of the protected groups

- A) *Chacon Navas case C-13/05*: disability is tied to the concept of a permanent limitation on activities, and while disability could arise from sickness, sickness is a separate concept that does not mean disability.



## The refusal to enlarge the number of the protected groups

- B) *Agafiei Case C-310/10*  
A discrimination under Romanian law on the basis of the socio-professional category to which a person belonged or on the basis of their place of work is not covered by either the Race or the Framework Directives.



## Although....

- *Ring and Skouboe Werge Joined Cases C-335/11 and C-337/11*

A curable or incurable illness entailing a physical, mental or psychological limitation may be assimilated to a disability.



## The opposite case. Widening the concept: discrimination by association

- *Coleman case 303/06* (associated or transferred discrimination): a person suffered discrimination and harassment because of the disability of her child
- Does the concept include also **discrimination by attribution?** (i.e. a person, although not actually possessing the protected characteristic her/himself, is perceived to be a member of the protected group or, despite being known not to belong to that group, is treated as if they were because of the possession of stereotypical characteristics).



## Other forms of unlawful conduct

- **An instruction to discriminate is considered as a form of direct discrimination** and is prohibited.
- **Victimisation:** adverse treatment (such as dismissal) as a reaction to a complaint or proceedings aimed at enforcing compliance with the principle of equal treatment.
- Not only the person who has been discriminated against is protected, but also **those who provide evidence** as part of a discrimination complaint, or are **involved in some other way** in the complaint.
- Could it be considered as a form of discrimination by association?

