

ERA CONFERENCE
APPLYING EU ANTI-DISCRIMINATION LAW
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Overview of the existing EU legislation
on equality and definition of key
concepts:
direct discrimination,
indirect discrimination
harassment

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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.



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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



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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*)



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...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*



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....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 *Kçükdeveci case C-555/97*)



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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*".



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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.



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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*



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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



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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?

