Overview

Structure of the presentation

• On the function of key concepts in law
• 4 types of discrimination in modern EU law
• Relevant in this presentation:
  – Direct discrimination
  – Indirect discrimination
  – Harassment

Note:
The Charts mentioned in this presentation are taken from: 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.
On the function of key concepts in law (1)

Especially in relation to prohibitions of discrimination
• Key concepts in law define the content of a legal provision.
• For that reason, they are decisive for the meaning of the provision in question.
• In the case of prohibitions of discrimination, the key concepts usually relate to:
  – the scope of the provision;
  – the concept of discrimination;
  – the justification of prima facie discriminatory treatment.

See Chart 2

On the function of key concepts in law (2)

The concepts relevant for this presentation
• “Direct discrimination”, ”indirect discrimination” and “harassment” concern the concept of discrimination (2nd level of the analysis).
• In modern directives, they are defined in specific articles (legal definitions, exception under EU law!).
• They are 3 out of 4 types of discrimination that are mentioned in the most recent generation of the EU’s non-discrimination law.
• Originally, the core provisions of Community law did not mention different types of discrimination.
4 types of discrimination in modern EU law (1)

Development: direct/indirect discrimination

- The Court of Justice (CJEU) develops the concept.
- Originally:
  - The CJEU interpreted the core non-discrimination provisions of the EEC Treaty in one sense only: they prohibited unequal treatment explicitly based on the criterion mentioned in the law.
  - This corresponds partially to the present concept of direct discrimination.
- Subsequently:
The CJEU developed in addition the concept of indirect discrimination, which formally is based on a different criterion.

4 types of discrimination in modern EU law (2)

Secondary law of the EU

- Subsequently, secondary law began to mention direct and indirect discrimination (internal market law, social law).
- As of 2000 a new generation of directives:
  - Direct discrimination;
  - Indirect discrimination;
  - Harassment;
  - Instruction to discriminate.

See Chart 4
4 types of discrimination in modern EU law (3)

Relevant legislation

- Racial and ethnic origin: Directive 2000/43/EC.
- Religion or belief, disability, age, sexual orientation: Directive 2000/78/EC.
- Sex:
  - Directive 2004/113/EC (goods and services);
  - Directive 2006/54/EC (sex: Recast);
- [Though not e.g.:
  - Internal market law (economic law);
  - Art. 157 TFEU (sex: equal pay);
  - Directive 79/7/EEC (sex: statutory social security);]
- Charter of Fundamental Rights.

Direct discrimination (1)

At first sight an easy concept …

- Case-law definition in Dekker (1990):
  “[…] whether a refusal of employment […] may be regarded as direct discrimination on grounds of sex […] The answer 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 .”
- In the Dekker case:
  - Refusal to hire the applicant ultimately due to her pregnancy.
  - CJEU: direct discrimination since only women can get pregnant.
- Compare, however, previous case-law of the USA (no sex discrimination, since not all women are pregnant).
Direct discrimination (2)

Legal definition

• E.g. Art. 2(2)(a) of 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 […]”

• Though only in the absence of justification; see Chart 6.

• Appears to be simple – focus on the use of the prohibited criterion.

• However, this has been qualified through subsequent case-law (see later).

Direct discrimination (3)

Some examples (1)

• A historical example according to the author Elizabeth von Arnim, in her novel “Elizabeth and her German garden” of 1875:
  – Concerns the pay for hired hands on the farm of 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.”

• Increasingly rare in case-law of the CJEU except for:
  – Somewhat special cases such as Feryn (2008) and ACCEPT (2013), concerning speech acts.
  – Cases involving age discrimination, where it is quite frequent; e.g. Prigge (2011).
Direct discrimination (4)


- Concerns ethnic discrimination.
- The director of a Belgian company for security installations states publicly that he will not employ immigrants / Moroccans.
- An association brings an action.
- CJEU:
  - Direct discrimination as it “is clearly likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market, constitutes direct discrimination in respect of recruitment […]. The existence of such direct discrimination is not dependant on the identification of a complainant who claims to have been the victim.”
  - (No considerations regarding justification.)

Direct discrimination (5)

Some examples (3): *Prigge* (2011) – unequal treatment

- Concerns age discrimination.
- Lufthansa dismisses pilots at age 60 (automatic mechanism provided for in a collective agreement).
- Three pilots bring an action.
- CJEU:
  - Unequal treatment directly 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.”
  - Accordingly, this is discrimination unless there is a justification.
Direct discrimination (6)

Some examples (4): Prigge (2011) - justification

• In theory, three justification grounds are possible.
• But none of them applies in the case at hand:
  – Neither Art. 2(5) on public security (here: aviation security): A prohibition of the activity is not necessary, a mere restriction might be sufficient.
  – Nor Art. 4(1) on a characteristic that constitutes a genuine and determining occupational requirement: The age limit is disproportionate.
  – Nor Art. 6(1) on a legitimate objective, including legitimate employment policy, labour market and vocational training objectives: Only social policy aims, which is not at issue in the present case.

Indirect discrimination (1)

For less obvious cases

• Legal definition e.g. in Art. 2(2)(b) of 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
• An example experienced by your speaker:
  – Conference of the European Commission on “Access to Justice: Knowing, Understanding and Asserting Rights to Equal Treatment” in Lisbon.
  – Visit of the famous Castelo do Saõ Jorge, where residents of Lisbon do not have pay an entry fee.
• Case-law of the CJEU, leading case O’Flynn (1996):
  – Regulation in the UK according to which the needy can turn to the State for a financial contribution to the costs of the burial of a relative.
  – Condition: burial in the UK – disadvantages migrant workers.
  – No justification.

Delimitation

Moving the dividing line
• E.g. Maruko (2008), see also Nikoloudi (2005):
  – The surviving partner of a homosexual partnership registered in Germany is refused a widowers pension because he was not married to his partner.
  – Only heterosexual partners can marry in Germany.
• Indirect discrimination on grounds of sexual orientation?
• CJEU: direct discrimination – without any further explanation (probably because the German regulation excluded all homosexuals, i.e. no homosexual could ever marry).

See Chart 7
Comparability

Aristotelian approach in both cases?

- Background – the general definition by the CJEU, e.g. in Case C-253/09 Commission v Hungary, para. 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 [...]”

- Aristotle: “to treat likes alike and unlikes unalike”.

- Legal definitions of direct and indirect discrimination:
  - The above clearly applies, see wording of the definition.
  - Also for indirect discrimination? Disputed, see also here the wording of the definition.

Harassment (1)

A new element

- Art. 2(2)(c) of Directive 2000/43/EC: “Harassment shall be deemed 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. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States [...]”

- Here clearly no Aristotelian approach. Background: the work of Catherine MacKinnon (USA, as of the 1970s).

- Sex: distinction between harassment and sexual harassment.
Harassment (2)

- Practically no case-law of the CJEU.
- Issue arises first in Coleman (2008):
  - "Agreed" termination of employment of a worker ultimately because of the severe disability of her son.
  - Issue: discrimination by association, including as one particular aspect harassment (offensive remarks addressed to the employee).
  - 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 principle of equal treatment enshrined in Directive 2000/78 and, in particular, to the prohibition of harassment laid down by Article 2(3) thereof.”

Examples (2): Belov (2013)
- Issue is also raised in Belov (2013), on which the Court did not decide on the substantive level due to inadmissibility.
- Elements:
  - Placing meters to measure electricity consumption at a height of seven metres on posts situated outside houses connected to the electricity network in areas of a Bulgarian city that predominantly inhabited by Roma people.
  - The equality body turns to the CJEU for a preliminary ruling.
  - CJEU: Request not admissible, since not a court or tribunal within the meaning of Art. 267 TFEU.
Harassment (2)

Examples (3)

- Compare EU staff law, where also psychological harassment (German version: “mobbing”) is prohibited.
- 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.
- E.g. Case F-52/02:
  - Isolation from others, avoiding talks, no tasks, negative rumours.
  - CJEU: Does not require any bad intention; the focus is on the repetition.

A remark on proof

Shifting of the burden of proof

- E.g. Art. 8 of 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.”
- Careful: To be distinguished from the definition of discrimination!
- E.g. Feryn (2008), where the second part concerned the burden of proof (in relation to actual discrimination in the employment practice; the first part was about the speech act).
To conclude

Thank you for your attention!

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On the Charts: www.eur-charts.eu