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REGULATORY FRAMEWORK AND DEFINITION OF KEY CONCEPTS

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 - ❖ Multiple forms of discrimination
- Other prohibited forms of conduct



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PART I

Functioning of anti-discrimination protection and the regulatory framework



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The origin of anti-discrimination protection: promoting economic integration

- The principle of non-discrimination is expressly contemplated in various provisions of the original Treaties, with the purpose of promoting economic integration
- According to the logic of the Treaties, discrimination is necessary because an arbitrary disparity in treatment between economic actors may have a negative effect on the creation of the project for a common internal market.



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Prohibition of discrimination in the European Treaties

- Art. 119 TEU (now Art.157 TFEU): equal pay for men and women
- Articles 6 and 48 TEU (now Articles 18 and 45 TFEU): prohibition of discrimination on the basis of nationality
- These provisions have direct horizontal effect (*Defrenne I*, case 43/75; *Walrave*, case C-36/74; *Bosman*, case C-415/93; *Angonese*, case C-281/98)



A different function: the principle of non-discrimination as an expression of the general principle of equality

- **The first step:** prohibitions of discrimination are a specific expression of the general principle of equality that, even if not explicitly recognised in the treaties, is to be considered as a fundamental principle of Community law, the expression of the common tradition of the Member States (for all: *Überschär*, case 810/79)



....and as a fundamental right of the person

- **The second step:** the Court of Justice recognises the principle of equality as a fundamental right: “*economic aims are secondary to social aims... that are the expression of a fundamental right*” (*Defrenne II*, case 149/77; P., case C-13/94)



Areas of general relevance of the gender equality principle

- Safeguarding competition
- Efficacy of Community law (*Defrenne I* - self executing character of the provisions of the treaty; *Marshall I* – direct efficacy of the directives)
- General principles of Community law (*Defrenne II*)
- remedies (*Marshall II*, *Dekker*, *Van Colson* – the effectiveness and proportionality of sanctions)
- Relations with the international legal system (*Levy*, *Minne*; Z.)



Does the principle of non-discrimination have direct horizontal effect? 1

- **The third controversial step:** in the *Mangold case*, C-144/04, the court interprets the prohibition of non-discrimination on the basis of age, contemplated by Framework Directive 2000/78 as the expression of the general principle of equality of Community law. The source of this principle is found in numerous instruments of international law and in the Member States' common constitutional traditions.
- Consequently, the Framework Directive is applied even if the deadline for its transposition has not yet expired.



Does the principle of non-discrimination have direct horizontal effect? 2

- A more cautious approach in subsequent judgments (*Bartsch* C-427/06: the principles concern only the national provisions within the sphere of application of European law; *Kücükdeveci* C-555/97): "the principle of non-discrimination on the basis of age, as effectively expressed in directive 2000/78"
- In *Association de médiation sociale*, case C-176/12, the Court confirms that "the principle of non-discrimination on the basis of age laid down in Article 21, paragraph 1, of the Charter, is in itself sufficient to confer on individuals a subjective right that can be invoked as such"; specifically that must
- In *Milkova case* C-406/15 the Court declares that Directive 2000/78 shall be applied "in conjunction with the general principle of equal treatment, laid down in Articles 20 and 21 of the Charter"



A new generation of anti-discrimination law. 1

The Treaty on European Union

Since the Treaty on European Union, European law has extended the field of application and scope of the principle of non-discrimination

- **Art. 2:** The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of people belonging to minorities. These values are common to the Member States in a society of pluralism, non-discrimination, tolerance, justice, solidarity and parity between women and men.
- **Art. 3.3:** The Union fights against social exclusion and discrimination and promotes social justice and protection, equality between women and men, solidarity among the generations and protection of the rights of the child.



A new generation of anti-discrimination law. 2

Treaty on the functioning of the European Union

- **Art. 8 TFEU:** among its actions, the Union aims to eliminate inequalities and promote equality, between men and women.
- **Art. 10 TFEU:** in the definition and implementation of its policies and actions, the Union aims to combat discrimination on the grounds of sex, race or ethnic origin, religion or personal convictions, disabilities, age or sexual orientation.
- **Art. 19 TFEU:** the EU has the competence to take appropriate measures to combat discrimination on the grounds of sex, race and ethnic origin, religion or personal convictions, disability, age and sexual orientation.



A new generation of anti-discrimination law.3

Charter of Fundamental Rights of the EU

- **Art. 20** Equality before the law

All people are equal before the law

- **Art. 21** Non-discrimination

Prohibition of any form of discrimination, **in particular**, on the grounds of sex, race, skin colour or ethnic or social origin, genetic characteristics, language, religion or personal convictions, political opinions or of any other nature, being a member of a national minority, property, birth, handicaps, age or sexual orientation.

- **Art. 23** Equality between men and women

Equality between men and women must be assured in every field, including employment, labour and remuneration. The principle of equality does not preclude the maintenance or adoption of measures establishing special advantages for the under-represented sex.



Secondary legislation

- Directive 2000/43 - on equal treatment, irrespective of **racial or ethnic origin**
- Directive 2000/78 - establishing a general framework for equal treatment in relation to employment and working conditions (Prohibited factors: **religion, personal beliefs, disability, age and sexual orientation**)
- Directive 2002/73/EC – amending Directive 76/207 on **equal treatment between men and women**
- Directive 2004/113 EC - implementing the principle of **equal treatment between men and women as regards access to goods and services and in their supply**
- Directive 2006/54/EC – **re-casting in a consolidated Act the directives on equality between men and women** with the exception of Directive 7/79 in relation to social security
- Directive 2010/41 – amending Directive 86/613 **on equality between men and women in self-employment**



Other relevant directives in relation to equality between men and women

- Council Directive 2010/18/EU, of 8 March 2010, which implements the revised framework agreement on **parental leave** and repeals Directive 96/34/EC
- Council Directive 92/85/EEC of 19 October 1992 concerning the implementation of measures aiming to promote **the improvement of safety and health at work for pregnant workers and workers who have just given birth or are breastfeeding**



PART II

Key concepts

- The objective and subjective fields of application of the prohibitions
- Prohibited forms of discrimination:
 - ❖ Direct discrimination
 - ❖ Indirect discrimination
 - ❖ Harassment
 - ❖ Multiple discriminations
- Other prohibited forms of conduct



Objective field of application

- Directive 2006/54/EC prohibits discrimination between men and women with regard to:
 - ❖ access to subordinate employment and self-employment or occupation
 - ❖ access to all types and levels of vocational guidelines and training, continuing vocational training and retraining;
 - ❖ working conditions, including dismissal conditions and remuneration;
 - ❖ affiliation and activity in a workers' or employers' organisation
 - ❖ Occupational social security schemes.
- Directive 2004/113/EC prohibits discrimination between men and women with regard to access to goods and services and their supply, outside the area of private and family life



Subjective field of application

- The two Directives apply to all natural persons and legal entities present in the EU, in the public and private sector, with the exclusion, as regards access to goods and services, of those provided in the private and family life sphere
- Directive 54/06 concerns employees and self-employed workers (the latter, at least with regard to access to labour and occupational and social security schemes)



The definitions are the same, the protections are differentiated

- The concepts of direct and indirect differentiation, harassment, retaliation, order to discriminate are the same for all the directives
- The protections are partially differentiated (e.g. different fields of application, different exceptions and justifications)
- A hierarchy between the factors?



Continuity and innovation

- The definitions reflect the case law of the Court of Justice and are influenced by the North American experience (the doctrine of *disparate impact*) and by international law (objective concept of discrimination and irrelevance of the subjective intent)
- However, they have original characteristics and have been interpreted in an innovative way by the ECJ (e.g. the qualitative concept of indirect discrimination, multiple discrimination and the concept of discrimination by association)



Prohibited discriminations

- The Directives prohibit
 - ❖ direct discrimination
 - ❖ indirect discrimination
 - ❖ harassment
- including:
 - discrimination by association (*Coleman, case C-303/06; Chez, case 83/14* "persons who have a certain characteristic or who, without having such a characteristic, are subjected, together with the former, to less favourable treatment or a particular disadvantage")
 - discrimination deriving from change of sex (recital 3 Directive 54/06/EC)



Direct discrimination

Directive 2006/54/EC

- **Art.2.1** Direct discrimination exists when, owing to a prohibited factor, a person is treated less favourably than another **is, has been or would be treated** in a comparable situation;
- **Art. 2.2.** Discrimination includes any less favourable treatment reserved for a woman for reasons connected with pregnancy or maternity leave



Examples

- *Rummler / Dato-Druck, case 237/85*: system of classification of work and the need for various criteria, which consider male and female aptitudes
- *Danfoss, case C-109/88*: equal pay for work of equal value / burden of proof
- *Kreil, case C-285/98*: unlawfulness of the exclusion of women from military services involving the use of weapons
- *Tele Danmark, case C-109/00*: protection of employment of pregnant workers in a fixed-term contract
- *Cadman, case C-17/05* : legality of the seniority criterion in the classification system – evaluation of work that is harmful to women who make use of parental leave
 - *Riežniec, case C-7/12*: parental leave and criteria of the choice of workers for redundancy on economic grounds



Fundamental elements

- Different (**less favourable**) treatment
- Comparison
- Causal link
- No justification allowed



Different (*less favourable*) treatment

- Treatment, not intention
- Act or omission; legal transaction; behaviour; public declaration (*Feryn case C-54/07*; *Asociația Accept case C-81/12*)
- Individual or collective
- With or without an identifiable victim (*Feryn, case C-54/07*)
- Even in the areas “empty” of legally protected rights or interests, and not only in the case of prejudicial rights or legitimate rights (*Chez, case C-83/14*), or even in the presence of merely discretionary powers (e.g. recruitment)



Comparison

When a person:

- **Is** (tangible and present circumstances)
- **Has been** (subsequent and tangible circumstances, compared with previous circumstances)

Macarthy's case C-129/79: “pay shall be the same for the same work and not only for the same work performed contemporaneously by a person of the opposite sex taken as a term of comparison (or of reference)”.

- **Would be** (hypothetical circumstances)

Thibault case C136/95: “if she had not been pregnant and had not taken the maternity leave to which she had a right, said employee would have received an assessment of her performance for the year in question and would consequently have had the possibility of an advancement in career”.

treated less favourably than another, in a comparable situation

- In some cases the term of comparison is not requested:

Dekker case C-177/88: “when the reason (for refusal to recruit a woman) consists of the fact that the person involved is pregnant, the decision is directly determined by the candidate's sex... the absence of male candidates cannot have an impact”.



Causal link: “based on”

- Causal link between treatment and prohibited factor
- The prohibited factor is not necessarily possessed by the discriminated person (*Coleman, case C-303/06*); or is possessed by the majority of the persons involved, not necessarily by all of them (*Chez, case 83/14: “the said measure has been set up and/or maintained for reasons in connection with the ethnic origin common to most of the residents in the neighbourhood in question”*)
- The author of the conduct may not be the employer, if the conduct is however due to him (*Asociația Accept, case C-81-12: “there is discrimination ..., if the controversial statements come from a person who presents himself and is perceived, in the information media and in society as the principal executive”*)
- Objective causal link: the subjective intent is not decisive; but an apparently neutral measure constitutes direct discrimination if the intent is discriminatory
- Necessary but **not exclusive** cause (multiple causes, e.g. in the case of dismissal)



Exceptions

- In principle, all the Directives envisage limited and circumscribed **exceptions** (i.e. exemptions – also of a general nature – to equal treatments established **ex ante** by the legislator), **they do not envisage justifications** (i.e. reasons of opportunity or necessity for the different treatment, alleged **ex post** by the author of the conduct)
- Justifications are allowed in relation to **age** by Directive 78/00/EC and in relation to **sex** by Directive 113/04/EC on access to goods and services



General exception: essential and decisive requirement

- Art. 14.2. Directive 54/06/EC

Concerning **access to work, including the relative training**, the Member States may establish that a difference in treatment based on a specific characteristic of a sex does not constitute discrimination where, for the particular nature of the working activities in question or for the context in which they are performed, this characteristic is an essential and decisive requirement for carrying out the working activity, provided that the aim is legitimate and the requirement proportionate (e.g. *Sirdar*, case C-273-97)

- It is a concept that refers to parameters of judgment that vary with time
- But, being exceptions, they should be interpreted in the restrictive sense, i.e. they must be limited and proportionate (*Kreil*, case C-285/98)



Specific exceptions and justifications

- Art. 5 of Directive 113/04/EC on goods and services, was without prejudice to different services and insurance premiums due to the use of actuarial calculations that considered the sex factor in the current contracts and until 2007
- This provision has been declared unlawful by the judgment *Tests Achats*, case C -236/09
- *Art. 4.5 of the Directive also envisages justifications*: “differences in treatment are allowed if the supply of goods or services exclusively or principally destined for persons of only one sex is justified by a legitimate aim and if the means used to accomplish the aim are appropriate and necessary”.



Indirect discrimination

- **Directive 2006/54/EC**
- **Art. 2.1.** There is indirect discrimination when an **apparently neutral** provision, criterion or practice may place persons belonging to one of the protected groups in a **particularly disadvantageous position** in relation to other people, unless this provision, criterion or practice are objectively **justified by a legitimate aim** and the means adopted for its accomplishment are **appropriate and necessary**.



Examples

- *Sotgiu, case 152/73*, EU foreign workers, remuneration
- *Jenkins, case 96/80*, part-time workers, hourly pay
- *Bilka, case 170/84*, part-time workers, pension scheme
- *Nimz, case C-184/89*, part-time workers, career development
- *O'Flynn, case C-237/94*: EU foreign workers, payment of social benefits
- *Seymour Smith C-167/97*: protection against dismissals for workers with more than two years' seniority



A difficult distinction...

Examples:

- *Schnorbus*, case C-79/99 : “the provision contemplates a certain number of circumstances that will be taken into consideration for priority access to internship for the legal professions. Among the latter there is the performance of compulsory military or community service. In a similar case the benefit of the priority laid down by the provision may not be considered as founded **directly** on the sex of the persons in question”; but may give rise to indirect discrimination because more disadvantageous to women than men
- *Chez*, case 83/14: discrimination is direct if “said measure has been established and/or maintained for reasons connected with the ethnic origin **common to the majority of the residents in the neighbourhood in question**”; it is indirect if the criterion of tampering with the meters **developed in neighbourhoods inhabited prevalently by Roma**
- An apparently neutral measure constitutes direct discrimination if it is “inextricably connected” with a prohibited factor (e.g. pregnancy and sex; marriage and sexual orientation: *Hay* Case C- 267/12)



...but a vital one

- Only in the case of indirect discriminations is it possible to put forward a justification
- This possibility has to do with the longer causal chain considered by the concept of indirect discrimination, which includes facts, circumstances and contexts outside the employer’s sphere of control or possibility of choice



Constituent elements

- **Apparently neutral** provision, criterion or practice
- Particular disadvantage (differentiated impact)
- Comparison
- Causal link
- Justifications (absence)



Particular disadvantage

The development of the concept: from statistical disparity to the “*particular disadvantage*”

- *Seymour Smith, case C-176/97*: statistical data should show a considerably lower percentage of female workers, concern a sufficient population and not reflect purely fortuitous or cyclical phenomena
- Directive 97/80/EC on the burden of proof: “ a markedly higher proportion of *individuals* of one of the two sexes”.
- Abandonment of statistical proof: *O’Flynn, case C-237/94* .
- *Chez, case 83/14*: “particular disadvantage **does not denote prominent, evident or serious cases of inequality, but indicates that particularly people of a certain racial or ethnic origin are at a disadvantage due to the provision, criterion or practice at issue**”



Comparison

- *O'Flynn, case C-237/94*: “It is not necessary in this regard to *ascertain whether the provision at issue applies **substantively** to a considerably higher proportion of migrant workers. It is enough to observe that this provision **is able** to produce such an effect*”: it is enough that in practice even a single individual is at a disadvantage, to allege that there is a prohibited discrimination
- In the text of the new directives, there is indirect discrimination even if there is only the *risk* that a provision is disadvantageous for people belonging to a protected group



Causal link

- Potential impact
- The causal link must be **appropriate**: the probability of that particular result being produced, according to a criterion of normal predictability. Common sense and common experience (what happens in practice) is sufficient to consider that potential indirect discrimination exists: see *O'Flynn, case C-237/94*



Justifications

- There is no indirect discrimination if the provision, criterion or practice are objectively justified by a **legitimate aim**, foreign to any discrimination based on the sex and the means used to accomplish this aim **are appropriate and necessary**
- **Examples:** flexibility or adaptability to variable times and places of work, vocational training or seniority of the worker (*Danfoss, case 109/88*)
- Market defences are possible (*Enderby, case C-127/92*)
- Budgetary considerations cannot justify in themselves differences in treatment between the two sexes (*Kutz-Bauer, case C 187/00*)
- A means is appropriate and necessary for accomplishing a legitimate social policy aim if it really fulfils the intent pursued and if it is implemented consistently and systematically in this respect (*Leone, case C-173/13*)



Harassment and sexual harassment

Directive 2006/54/EC

Art. 2.1.c Undesirable behaviour, having the **aim** or **effect** of violating a person's dignity and of creating an intimidating, hostile, degrading and offensive atmosphere.

- The subject of investigation is the behaviour's aptness to harm human dignity, without the need to make a comparison with other people's situations, it is sufficient to show that it is **sex-related**.



Sexual harassment

- **Art.2.1.d.** Unlike sex-related harassment, where what emerges is that one is harassed as a woman or as a man, in sexual harassment the behaviour is of a sexual nature
- It may be of a verbal, non verbal or physical nature (e.g. sexual advances or sexual blackmail)



Multiple discriminations

- A person undergoes multiple discrimination when more than one discriminatory factor is involved. It affects women above all: Directive 2000/43/EC recital 14, and Directive 2000/78/EC, recital 3)
- Some examples: *Coleman*, case C-303/06 (disability and sex); *Meister*, case C-415/10 (age, sex, ethnic origin); *Achibita*, case 157/15 (sex and religion)



Discrimination by association

- It is a “**transferred discrimination**: *Coleman, case C-303/06*): a person is subjected to discrimination and harassment owing to their child’s disability; *Chez, case C-83-/14*: people who do not have Roma origins and who reside in «Roma neighbourhoods» are also affected by controversial practice
- Towards an **extension of the concept?**
Discrimination by attribution: a person, although not having the protected characteristics, is perceived as being a member of the protected group or, although known as not belonging to that group, is treated as if they were, due to the fact of having the stereotype characteristics



Other prohibited forms of conduct

- **The order to discriminate is considered a form of discrimination** and is prohibited.
- **Retaliation**: hostile treatment (e.g. dismissal) as a reaction to an action aimed at obtaining the application of the principle of equality.
- ❖ Protection from retaliation is guaranteed not only for the discriminated person but also for those who witness or are otherwise involved in the proceeding aimed at ascertaining the discrimination

