

ERA VILNIUS

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DEFINITIONS OF KEY CONCEPTS

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Direct discrimination

Definition

1. 2006/54/EC, art.2: “where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation”
2. Its meaning will draw on cases on the meaning of the direct discrimination definition in the other discrimination legislation eg 2000/43/EC and 2000/78/EC.

Less favourable treatment/disadvantage

3. Subjecting a person to less favourable treatment usually involves a disadvantage to them.
4. Whether there has been a disadvantage is a matter for national courts.
5. However, it is not necessary that the disadvantage be serious - in *Chez Razpredelenie Bulgaria Ad V. Komisia Za Zashtita Ot Diskriminatsia, Case C-83/14* (“CHEZ RB”), Bulgarian legislation requiring that the unfavourable treatment directly or indirectly prejudice “rights or interests” was held to be incompatible with 2000/43/EC.

6. In the UK the courts have decided that it is sufficient if a reasonable person in the position of the claimant might consider the treatment to his disadvantage.

“on grounds of sex”

7. There are two issues here – (1) the meaning of “sex”, and (2) the meaning of “on the grounds of”.
8. “Sex” includes gender reassignment – see para (3) of the preamble to 2006/54/EC – *“The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person.”*
9. Equal pay - Art.4 of the Directive expressly requires equal pay for equal work.
10. Para (8) of the preamble says: *“The principle of equal pay for equal work or work of equal value as laid down by Article 141 of the Treaty and consistently upheld in the case-law of the Court of Justice constitutes an important aspect of the principle of equal treatment between men and women and an essential and indispensable part of the acquis communautaire, including the case-law of the Court concerning sex discrimination. It is therefore appropriate to make further provision for its implementation.”*
11. Pregnancy/Maternity Leave - 2006/54/EC covers pregnancy. Para (23) of the preamble says: *“It is clear from the case-law of the Court of Justice that unfavourable treatment of a woman related to pregnancy or maternity constitutes direct discrimination on grounds of sex. Such treatment should therefore be expressly covered by this Directive.”*
12. And art.2(c) also expressly includes “any less favourable treatment of a woman related to pregnancy or maternity leave”.

13. The meaning of “on the grounds of” - The majority of the different language versions of the definition use this form of wording, rather than “on grounds of his sex”.
14. But whatever the particular form of the wording in any language version, it is clear from ECJ judgments, such as *CHEZ RB* above, that 2006/54/EC does not require that the treatment be on the grounds of the sex of the claimant. The treatment of the claimant could be on the grounds of the sex of some other person. This means that associative direct discrimination, as in *Coleman v Attridge Law C-303/06*, is prohibited.

Comparator

15. This involves considering how the claimant has been treated, compared to how a comparator “is, has been or would be treated”.
16. Current comparator - The comparator may be a person currently treated in a particular way. The circumstances of that hypothetical comparator and of the claimant must in all material respects be the same, save for the protected characteristic.
17. For example, if a female police officer complains of direct sex discrimination in not being promoted and compares herself to a male officer who was promoted, the court might expect to see significant similarities as regards their qualification, experience and abilities. Of course, there may turn out to be no suitable actual comparator (though an actual comparator was treated may be of evidential value).
18. Past comparator - Or the comparator may be a person who has been treated in a particular way in the past: *Macarthy's Ltd v Smith Case 129/79*. The ECJ held that a complainant could bring an equal pay complaint where she received less pay than a man doing equal work and who was employed before her.

19. Hypothetical comparator – Or the comparator may be a hypothetical comparator (“would be treated”). The parties often confuse each other - and the court - when the claimant relies on a hypothetical comparator. In such cases the most effective question may simply be to determine the reason why the claimant was treated in a particular way.
20. Comparator – maternity/pregnancy – there is no comparison between a pregnant woman and a male who is ill. The basic approach in direct discrimination is to treat similar cases similarly and different cases differently. Pregnancy is a situation which has no comparison.
21. In *Webb (appellant) v. EMO Air Cargo (UK) Ltd (respondents) Case No C-32/93* the ECJ held that dismissal of a woman on grounds of pregnancy constitutes direct discrimination on grounds of sex. Since pregnancy is not in any way comparable with a pathological condition, and even less so with unavailability for work on non-medical grounds, there can be no question of comparing the situation of a woman who finds herself incapable by reason of pregnancy of performing the task for which she was recruited with that of a man similarly incapable for medical or other reasons.

Causation

22. Sex need not be the sole or predominant cause of the disadvantage. It must form no part whatsoever of the treatment.

Reason etc for the treatment

23. But what causal link is required?
24. The words of the definition – “on grounds of” – make clear that causation is an objective question. What, viewed objectively, was the reason for the treatment?
25. In *CHEZ RB* at para 91 the ECJ said the question the national court had to answer as regards direct discrimination was whether the “*measure proves to have*

been introduced and/or maintained for reasons relating to the ethnic origin common to most of the inhabitants of the district concerned, a matter which is for the referring court to determine by taking account of all the relevant circumstances of the case.”

26. The “reason” for the treatment is different from the motive or intention for it. A person may discriminate even from the best of motives.
27. Identifying the reason calls for some examination of the mental processes (whether conscious or unconscious) of the alleged discriminator. Did the proscribed reason act on his mind? One way of looking at the problem can be to ask whether but for the proscribed reason the alleged discriminator would have acted as he did. This analysis can be difficult for the court.
28. Inherently discriminatory criterion – If the ground for the treatment is inherent in the act itself, the court will not need to analyse the mental processes of the alleged discriminator. This does not involve a “but for” analysis. Instead, the treatment can amount automatically to direct discrimination.
29. An example is discrimination against a woman because she is pregnant – *Webb*;
30. Superficially there can be a complication if the treatment claimed to be discriminatory is not explicitly discriminatory. But if it is necessarily discriminatory, there is still no need to examine the alleged discriminator’s mental processes.
31. There are various examples in the ECJ case law:
 - i. Rules connected with entitlement to an old-age pension which are capable of having an effect *only* for the benefit or to the detriment of persons of a certain age amount to direct age discrimination - *Ingeniorforeningen i Danmark* C-499/08, paras 23 and 24);

- ii. Direct discrimination on grounds of sexual orientation existed where a benefit provided for couples was withheld from same-sex couples who had entered into a marriage-like registered life partnership and did not themselves have access to the institution of marriage - *Maruko* C-267/06, para 72 and *Römer* C-147/08, para 52.
32. Stereotyping – Even though stereotyping may accurately describe some members of a group that share a particular characteristic (eg race/nationality), if the defendant applies a stereotyping approach to the particular claimant, and does not consider his particular characteristics, unfavourable treatment will amount to direct discrimination.

Person

33. “Person” includes a natural person.
34. The definition may also include a legal person. In the context of 2000/43/EC preamble para (16) provides that *“It is important to protect all natural persons against discrimination on grounds of racial or ethnic origin. Member States should also provide, where appropriate and in accordance with their national traditions and practice, protection for legal persons where they suffer discrimination on grounds of the racial or ethnic origin of their members.”*
35. See also A-G Kokott’s opinion in *CHEZ RB*, a race case, which refers to this para in the preamble, and says at para 65: *“Even legal persons can enjoy protection against discrimination where necessary”*.

Is a victim necessary?

36. In *Centrum Voor Gelijkeheid Van Kansen En Voor Racismebestrijding (Applicant) V. FIRMA FERYN NV (respondent)* C-54/07 a director of a garage door company made racially discriminatory statements in public about not employing “immigrants” ie Moroccans.

37. The equality body in Belgium brought proceedings, though no individual claimant did ie no there was disappointed Moroccan applicant for employment.
38. The ECJ held that in paras 21 to 28 that even in the absence of an identifiable victim the public statements constituted direct discrimination in respect of recruitment.

Justification

39. The essential position is that there can be no justification of direct discrimination – *Dekker (applicant) v. Stichting Vormingscentrum Voor Jonge Volwassen (VJV-Centrum) Plus (respondents) C-177/88*, paras 24 and 25.
40. However, in very limited circumstances a genuine occupational requirement defence is possible (applicable to both direct and indirect discrimination).
41. The definition is in art.14(2): “Member States may provide, as regards access to employment including the training leading thereto, that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate.”

Indirect Discrimination

Definition

42. 2006/54/EC, art.2: “where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary”.

43. If direct discrimination is concerned with formal equality, indirect discrimination is concerned with equality of outcome.

Provision, criterion or practice (“PCP”)

44. These three terms are alternatives, they are not cumulative. If any one of them exists, there is a PCP. A PCP is liable to include works rules, provisions in collective agreements.
45. Treatment can still qualify as a PCP even if it is not a requirement or a condition.
46. Although indirect discrimination is about group disadvantage, in principle there can be a PCP even if the treatment is of only one person.
47. If the claimant can formulate a PCP, it does not matter that the defendant can formulate another PCP that does not involve indirect discrimination.

Apparently neutral

48. The essence of an indirect discrimination claim is that the PCP on the face of it appears neutral. In other words, it is not directly discriminatory.
49. For example, a height or strength requirement for police officers, or that employees work a rotating shift pattern, or for particular length of service for a pay increases.

Selection of Pool

50. Indirect discrimination considers whether the PCP puts a person or group at a disadvantage. It is essential to make an appropriate selection of the pool of people for analysis. The selection will be for the national court. The UK courts have said that there is usually only one correct pool and that its selection is a question of logic.

51. For example in *CHEZ RB*, one possible pool for the national court, if addressing indirect discrimination, might theoretically be all those in the particular Bulgarian district under consideration, in the Gizdova Mahala district of Dupnitsa. However, that pool would be inappropriate. If only that district were analysed, 100% of Roma and 100% of non-Roma would be considered disadvantaged.
52. But if all other districts served by CHEZ RB were considered, the figures for disadvantage suffered would be very likely to be different - overall in Bulgaria a significant proportion of Roma might be disadvantaged compared to a much smaller proportion of non-Roma – see AG opinion para 101.
53. In *Kenny C-427/11* the ECJ said: “In that regard, it must be noted that a comparison is not relevant where it involves groups formed in an arbitrary manner so that one comprises predominantly women and the other predominantly men with a view to carrying out successive comparisons and thereby bringing the pay of the group consisting predominantly of women to the level of that of another group also formed in an arbitrary manner so that it consists predominantly of men (see Case C-400/93 *Royal Copenhagen* [1995] ECR I-1275, paragraph 36).”

Particular disadvantage

54. Disadvantage means the same as in direct discrimination.
55. Statistics are not required. The test is “particular disadvantage” for those to whom the PCP is applied.
56. In *Seymour-Smith C-167/97*, concerned with whether a two-year period of qualification for certain UK statutory rights was sex discrimination, at para 60 the test the court addressed was “*whether the statistics available indicate that a considerably smaller percentage of women than men is able to satisfy the condition of two years' employment required by the disputed rule*”. Such a test, which was statistics based, made it harder for claimants to succeed than under the current test.

57. The claimant will also need to suffer a disadvantage, though the definition does not spell this out.
58. In CHEZ RB the ECJ held that associative indirect discrimination came within the scope of the legislation.
59. However, does the definition of indirect discrimination require that there be a causal link between the disadvantage suffered and the shared characteristic of the group?
60. Take a hypothetical example – Assume that in the UK female civil service employees perform significantly worse in written promotion exams than their male civil service colleagues (a fail rate of 60% compared to 30%). Assume that a disappointed female candidate who has failed her promotion exam brings a complaint of indirect discrimination. The PCP for promotion is the need to pass the exam. For her claim to succeed is it necessary that there be a causal link between being female and propensity to fail? Or do the statistics alone place a burden on the employer to justify?
61. There is no ECJ case on this yet, and the wording of the definition does not apparently require a causal link, but it would be unsurprising if there were a case on the point.

Justification

62. The issue whether there is a legitimate aim, and whether the means used to achieve it are appropriate and necessary, are also known as justification.
63. In CHEZ RB the ECJ said at para 112 that the *“concept of objective justification must be interpreted strictly”*.
64. One of the leading cases is *Bilka-Kaufhaus GmbH v Weber von Hartz* C-170/84, a sex discrimination case involving the exclusion of part time workers from an occupational pension scheme. The ECJ held that if the national court finds that the measures chosen by the employer correspond to a real need on

the part of the undertaking, are appropriate with a view to achieving the objectives pursued and are necessary to that end, the fact that the measures affect a far greater number of women than men is not sufficient to show that they constitute discrimination.

Legitimate aim

65. Legitimate aim is separate from the means used to achieve it. A legitimate aim is one that the court recognises as legitimate. As *Bilka* says, the aim must “correspond to a real need”.
66. Some aims are not legitimate. There is no definition in the EU legislation of what constitutes a legitimate aim, though there are cases on it.
67. The ECJ has held that cost alone can never be a legitimate aim for member states introducing legislation. Therefore, it would not be legitimate for member states to seek to reduce social security liabilities by reducing payments to women.
68. The UK courts have recognised as legitimate the aim of cost plus some other aim (so-called “cost-plus”). Whether such an aim would be recognised as legitimate in other member states is not known.
69. Ex post facto legitimate aim – The ECJ cases do not hint that the objective pursued has to be that which was in the minds of those who adopted the measure in the first place.
70. Indeed, the national court asked the ECJ that very question in *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe and others* C-341/08. The answer given at para 42 was that it was for the national court “to seek out the reason for *maintaining* the measure in question and thus to identify the objective which it pursues”.
71. Therefore, there may be an ex post facto rationalisation.

72. However, the court is entitled to look with special care at alleged aims that were not, or may not have been, in the decision-maker's mind at the time of the decision.

Appropriate and necessary

73. These two criteria must be separately considered. Sometimes they are referred to together as "proportionality".

74. A PCP may be "appropriate" if it is suitable for achieving the aim.

75. In addition, if the defence is to succeed, the PCP must be "necessary". This means reasonably necessary and not absolutely necessary. However, the PCP must go no further than is needed.

76. The gravity of the effect upon the employees discriminated against has to be weighed against the importance of the legitimate aims in assessing the necessity of the particular measure chosen - *Fuchs and another v Land Hessen C-159/10 and C-160/10*.

77. There are many ECJ cases that illustrate the analysis. One is *Küçükdeveci v Swedex GmbH & Co KG C-555/07*.

- i. It was an age discrimination case, about a law which calculated the length of notice to which employees were entitled by reference to their length of service but disregarding any period of service below the age of 25.
- ii. The aim of facilitating the recruitment of young people, who could react more easily to the loss of their jobs, by increasing the flexibility of personnel management, was legitimate.
- iii. But the law was not "appropriate" to that aim because it applied to all employees who joined before 25 irrespective of their age at dismissal.

- iv. Nor was it “appropriate” to the aim of strengthening the protection of workers according to their length of service.

Enderby type indirect discrimination

78. In *Pamela Mary Enderby v. Frenchay Health Authority and Secretary of State for Health* C-127/92 the ECJ extended the concept of indirect discrimination.
79. Mrs Enderby was a speech therapist employed in the National Health Service. Speech therapists were almost exclusively female. She claimed that she was paid less well than clinical psychologists and pharmacists, who were, in different degrees, predominantly male. It was assumed that the work performed was of equal value.
80. Mrs Enderby was not claiming that there was any direct sex discrimination. Equally, she was not claiming that there were any specific hurdles (i.e. a PCP) which created an impediment to her gaining access to either of the other professions. Different processes of collective bargaining governed the pay structures of the different professions.
81. The ECJ found, at para 16 that, “*However, if the pay of speech therapists is significantly lower than that of pharmacists and if the former are almost exclusively women while the latter are predominantly men, there is a prima facie case of sex discrimination, at least where the two jobs in question are of equal value and the statistics describing the situation are valid.”*
82. It found at para 17 that “*It is for the national court to assess whether it may take into account those statistics, that is to say, whether they cover enough individuals, whether they illustrate purely fortuitous or short-term phenomena, and whether, in general, they appear to be significant.”*
83. Therefore *Enderby* apparently establishes that statistics alone may in a sufficiently powerful case create an apparently irrebuttable presumption of prima facie indirect sex discrimination. It is a difficult question whether it is irrebuttable.

84. If it is irrebuttable, once there is statistically valid evidence demonstrating that a group is being adversely affected on sex grounds, the employer must justify the treatment. It will insufficient for it to demonstrate that the arrangements have resulted without any direct sex discrimination occurring. The court is holding in effect that there must somewhere have been some element of indirect sex discrimination.

Direct/indirect discrimination – other issues

85. Discrimination is either direct or indirect; it cannot be both.
86. The reason the classification matters is that there are different legal elements of the two different forms of discrimination. In particular, there can be no justification of direct discrimination whereas there can be justification of indirect discrimination.
87. There can sometimes be real difficulty in working out whether the complaint is one of direct or indirect discrimination. This can be seen from the legal history of *CHEZ RB*.
- v. The national equality body, the KZD, decided in April 2010 that the policy was indirect discrimination on grounds of nationality.
 - vi. After that decision was annulled, in May 2012 the KZD decided that *CHEZ RB* had discriminated directly against the complainant, Ms Nikolova, who was non-Roma, on the grounds of her “personal situation”, by which it meant the location of her place of business.
 - vii. The referring court – bizarrely in my view - considered that, because Ms Nikolova, by her application, assimilated herself to the population of Roma origin inhabiting the district concerned, alongside which she suffered the disadvantages stemming from the practice in issue, she could be regarded as having defined herself as being of Roma origin (see judgment, para 48).

- viii. A-G Kokott concluded in para 87 “it would appear that there is not sufficient evidence of direct discrimination in the present case”.
- ix. By contrast, the ECJ, in paras 80 to 91, whilst giving guidance to the national court, gave strong hints that it considered the meter policy to be direct discrimination.
88. Intersectional discrimination – This terminology usually denotes a situation where two or more forms of prohibited discrimination intersect in such a way that the influence of the various grounds cannot be disentangled (see the definition in “multiple Discrimination In EU Law” http://ec.europa.eu/justice/gender-equality/files/multiplerediscriminationfinal7september2009_en.pdf, p.3)
89. For example the complainant says she has been treated in a particular unfavourable way because she is both female and black.
90. There are currently a couple of pending cases before the ECJ on the issue.

Harassment

91. There are two types of prohibited harassment.
92. The first, sex-related harassment, is defined in 2006/54/EC, art.2, as follows: “where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment”.
93. There are three main elements to the definition: (1) unwanted conduct, (2) with the specified purpose or effect, and (3) related to sex.
94. Unwanted conduct refers to conduct that is unwelcome. As UK guidance states, this does not mean that the complainant is always required to make clear that she finds certain conduct or language unacceptable. For example,

there may be many cases where it will be perfectly clear that offensive remarks about persons are unwanted by those persons (DTI explanatory notes on Religion and Belief Regulations).

95. A single act might be sufficient if serious enough.
96. The conduct must “relate to” the sex of a person. This is a wider test than “on grounds of”. However, unwanted conduct not related to sex is not prohibited by 2006/54/EC however offensive it may be, since the legislation is concerned with sex equality.
97. It may be committed by a man against a man or a woman against a woman, as well as by a woman against a man or vice versa.
98. Gender reassignment – since gender reassignment is within the scope of 2006/54/EC (see above) gender reassignment harassment is prohibited.
99. Violates dignity – This will be a question of fact for national courts. There may be objective and subjective elements to it ie (1) subjectively did the complainant consider her dignity violated, and (2) objectively, was the conduct such that a reasonable person in the position of the claimant would have considered her dignity violated.
100. A national court may find that things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended, do not violate dignity.
101. Intimidating etc environment – Again a question of fact for national courts. However, an environment is likely to amount to a state of affairs.
102. Purpose or effect – “Purpose” requires an examination of the mental processes of the alleged harasser.
103. “Effect” requires consideration of the actual effect, and does not require examination of the alleged harasser’s mental processes or intention. However,

it may be permissible for the court to scrutinise the context of the conduct and in doing so consider the purpose of the alleged harasser.

104. Comparator - Note that there is no need for a comparator. All that is required is that the conduct “relate to” sex.
105. Justification – There can be no justification of harassment.

Sexual harassment

106. This second form of prohibited harassment, sexual harassment, is defined in 2006/54/EC, art.2, as follows: “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”.
107. This involves unwanted conduct of a sexual nature.
108. Otherwise, the elements are the same as for sex-related harassment.

Paul Epstein QC, 2 June 2016