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Non-discrimination in EU law: key concepts



Purpose & Limitation



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- Non-discrimination in EU (employment) law: general concepts
 - Pedagogical & introductory approach

 - Excluded:
 - Personal scope
 - Proof & remedies
 - Special regimes: age, disability, religion
 - Human rights

Structure



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- Constitutive elements of prohibited discrimination
 - Direct, indirect, positive action
 - Principles of justification



ABC

Acquired principles



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- Discrimination is “*the application of different rules to comparable situations or the application of the same rule to different situations*”: **different or identical treatment**
 - Based, directly or indirectly on the protected trait: **causation**
 - **Direct** discrimination: the individual & the trait
 - **Indirect** discrimination: the group & the impact

A General Principle of EU Law



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- Horizontal & vertical
 - Only: within the scope of EU-law (*Bartsch C-427/06*)

Protected Traits



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- Nationality
 - Sex + Gender
 - Sexual orientation
 - Racial or ethnic origin
 - Religion or belief
 - Disability
 - Age

 - “Any ground”: Lisbon upgrade of EU Charter of Fundamental Rights

Warning



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- No comprehensive theory or concept of discrimination

 - Organic development, often case-law driven

 - Still developing

 - Tango between CJEU and national judges



Unpacking the elements

CJEU & Discrimination



*‘the application of different rules to comparable situations
or the application of the same rule to different situations’*

Constitutive Elements



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- Treatment
 - Causal link with the protected trait
 - Comparison

Treatment



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- Action or inaction
 - Individual or collective
 - *Less favourable* treatment:
 - Different + negative
 - Extent of the difference irrelevant
 - Both a punctual and a global approach

Treatment



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- Action/inaction v. intention or simple words
 - *Feryn C-54/07 (2008)*: public declaration that is likely to impact the protected group
 - CJEU:
 - Focus on the goal and effectiveness
 - Constitutes direct discrimination, even without any victim
 - Presumption of discrimination for the possible victim

Causation



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- Causal link with the protected trait
 - Objective causation:
 - **Motivation** or intention is not determining
 - **External origin** is covered: e.g., clients, the market, the boss
 - Faulty **perception** is covered
 - Protection **by association** is possible

Causation



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- Primary causation (necessary or determining) v. secondary causation: one of the co-determining factors
 - Importance of the proof system: ***presumption of causation/discrimination***

Comparison



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- Comparison = formal equality
 - Employment: in the same company, except if single source (CBA)
 - With a person or a group of persons who are objectively comparable (or incomparable), leaving aside the protected trait: the '*comparator*'
 - Comparison **for the issue *in concreto***, e.g. "equal work" for equal pay

Comparison



- Present and real
- Past and real
- Potential (past/present/future)

☞ *the factual disappearance of the comparator, but for proof expediency*



Direct/Indirect

Direct discrimination



-
- “where one person is treated less favourably than another **is**, **has been** or **would be** treated in a **comparable situation** on grounds of...”
 - Causation = *a priori* other person would be treated differently

☞ *the factual disappearance of the comparator, but for proof expediency*

Examples



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- Age:
 - In human resources policies
 - In wage agreements
 - At individual or collective dismissal
 - Importance of justifications
 - Gender, racial/ethnic origin and religion :
 - Direct discrimination less common

Indirect Discrimination



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- “where an **apparently neutral** provision, criterion or practice **would put** persons of [the protected trait] at a particular disadvantage compared with other persons”
 - Formal neutrality aka intrinsically legitimate
 - “Discriminatory” consequences that are **sufficiently disproportionate** (presumption)
 - **Comparable situation**

Indirect Discrimination



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- **Statistical analysis** :
 - **Substantially disproportionate** percentages: “a considerably higher number”
 - Statistical impact to be assessed **at the level where the measure/legislation under scrutiny was adopted** (*Allonby, Voss*), *not* the level of its application
 - Difficulty to compose reference groups and become data that are **statistically relevant and cover a sufficient period**

Indirect Discrimination



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- **Potential impact** : “**would put** persons of [the protected trait] at a particular disadvantage”
 - **Intrinsic likelihood & theoretical effect** – unclear how “particular” the disadvantage has to be

Examples



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- Seniority or experience ⇨ age
 - Blue collar / white collar ⇨ race, ethnic origin
 - Working time organisation ⇨ religion/belief
 - Clothing conditions ⇨ religion/belief
 - Language proficiency ⇨ race, ethnic origin
 - Recruitment criteria (experience, degrees, etc.) ⇨ race or ethnic origin

Direct/Indirect can be grey



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- Pregnancy - Sex change - Sexual orientation

☞ *Whenever a “neutral” criterion is **inseparable from the protected trait**, insofar that only protected persons can be affected: direct discrimination*

The headscarf and religion/belief



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- ‘Religion/belief’ covers manifestation of faith in public
 - Wearing a headscarf = manifestation of religion...BUT
 - *G4S Secure Solutions (C-157/15)*: indirect IF
 - An internal rule of a private undertaking prohibits the visible wearing of *any political, philosophical or religious sign in the workplace*
 - When the application of the rule covers any manifestation of *any beliefs without distinction*

Periods of service and Age



- Seniority = indirect age discrimination
- Tyrolean Airways C-132/11: “(...) a difference in treatment according to the date of recruitment by the employer concerned (...) is not, directly or indirectly, **BASED on age** (...). That provision is based on a criterion which is neither **inextricably nor indirectly LINKED to the age** of employees, even if it is conceivable that (...)” the time of advancement differs with age



Positive Action/ Discrimination

Positive Action/Discrimination = Exception



- Art. 157(4) TFEU & amended and recast Equal Treatment Directive:
 - “With a view of ensuring **full equality in practice** between men and women in working life, **the principle of equal treatment shall not prevent** any Member State from maintaining or adopting **measures** providing for **specific advantages** in order to make it **easier** for the under-represented sex **to pursue a vocational activity** or **to prevent or compensate for disadvantages in professional careers.**”
- Art. 5 D2000/43 and Art. 7.1 D2000/78:
 - “With a view of ensuring **full equality in practice**, **the principle of equal treatment shall not prevent** any Member State from maintaining or adopting **specific measures to prevent or compensate for disadvantages** linked to any of the grounds.”

The Acquis



- Formal equality is the **rule**, positive discrimination the narrow **exception**
- Objectively address occupational difficulties of the favoured group
- Clear and unambiguous criteria
- Proven and genuine group imbalance
- Appropriate and necessary – proportionality & thus intrinsically temporary
- No automatic quotas – ‘saving clause’
- Overall, EU/CJEU emphasis is on formal neutrality BUT there is a lot of positive action that does not run afoul of neutrality: comparator requirement

Positive Substantive Discrimination = Generous



Art. 6 D2000/78 – Positive action/discrimination on grounds of age

- “Notwithstanding (...) 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.”

Rosenblatt (C-45/09) 2010

- (...) it does not appear unreasonable for the authorities of a Member State to take the view that a measure such as the authorisation of clauses on automatic termination of employment contracts on the ground that an employee has reached the age at which he is eligible for a retirement pension may be appropriate and necessary in order to achieve legitimate aims in the context of national employment policy.

Positive Substantive Discrimination = Generous



Art. 4.2 D2000/43 – Religion

- Religion can be used as an occupational requirement ‘(...) in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, (...) where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement (...)’

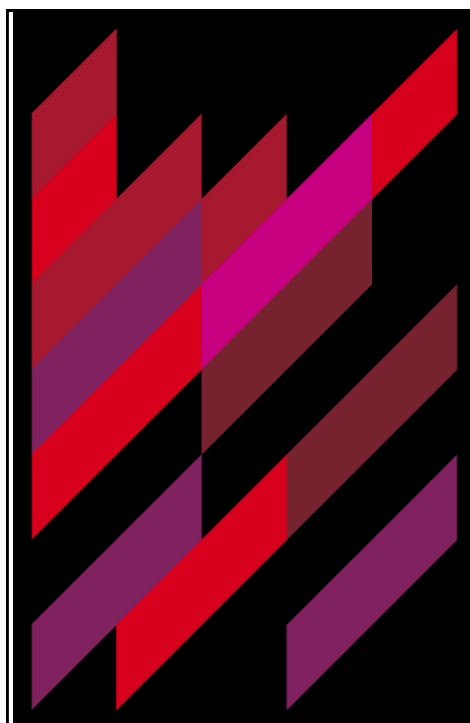
Egenberger (C-414/16) 2018

- ‘balance between the right of autonomy of churches and other organisations whose ethos is based on religion or belief, (...) and, (...) the right of workers (...) not to be discriminated against on grounds of religion or belief (...)’. Consequently, EU non-discrimination law must, except in very exceptional cases, refrain from assessing whether the actual ethos of the church or organisation concerned is legitimate

How Consistent is the CJEU? “Positive” Age Discrimination



- How effective is effective? Politics vs. economics and ‘the lump of labour’ fallacy
- How necessary is necessary? Group generalisations vs. personal merit



Justification Principles

Context



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- When faced with a claim of presumptive prohibited discrimination, the defendant can:
 - Contest the existence of a presumption
 - Refute the presumption by giving an objective reason
 - **Accept the discrimination, but try to justify it**

Principles



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- Direct discrimination cannot be justified unless explicitly authorised (closed system)
 - Indirect discrimination can be justified (open system)

Direct Discrimination



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- Principle : no justification possible, except where authorized by the law
 - Authorized in the 2000 Directives:
 - **Age**: legitimate aim with proportionality, e.g. legitimate employment policy, labour market and vocational training objectives
 - **Religion and belief**: the church and *Tendenzbetriebe*
 - When, 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 (GDOR)**
 - Gender directives: GDOR exception optional for MS

GDOR



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- Requirement must be **legitimate, i.e. non-discriminatory**: *not the protected ground per se but a characteristic related to that ground (Wolf C-229/08; Prigge C-447/09): ≠ churches and Tendenzbetriebe vis-à-vis religion*
 - **Objectively dictated** by the nature/context of the occupation, NOT subjective considerations such as customer wishes (*Micropole C-188/15*)
 - Requirement must be **proportionate** – not beyond what is necessary
 - Remains **exceptional** and to be determined on a case-by-case basis

Indirect Discrimination



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- General justification:
 - The neutral provision, criterion or practice is “*objectively justified by a legitimate aim and the means to achieving that aim are appropriate and necessary*”

Indirect Discrimination



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- **Legitimate aim**: a real need for the source or an acceptable policy aim - in particular *non-discriminatory*: intrinsically OK
 - **Measure is effective** vis-à-vis the aim
 - **Measure is appropriate and necessary**: no less discriminatory alternatives to achieve the aim
 - Necessary may include inability to offer another post within the company (*G4S Secure Solutions*)
 - Case-by-case – **no generalisations and stereotypes**
 - **Cost alone may not justify**: case-law in gender issues

Examples



-
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Conclusion

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- Tool box with quite mature concepts
- The implication and application of the concepts leaves plenty of room for interpretation at MS level

- Always a work in progress
- Policy has moved beyond non-discrimination: mainstreaming and positive action

Conclusion



- EU-law is mixing formal and substantive equality in its sources and concepts

- EU-law interpretation of formal equality is embracing substantive equality goals organically

- ➡ No binary divide between formal equality of opportunity and substantive equality of outcomes



Thank you

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