Purpose & Limitation

• Non-discrimination & the EU Directives: general concepts

• Pedagogical & introductory approach

• Excluded:
  • Personal scope
  • Proof & remedies
  • Special regimes (age, disability, religion)
Structure

• Brief reminder of the principles – *continuity with the “acquis communautaire”*

• Constitutive elements of prohibited discrimination

• Direct, indirect, positive discrimination, and harassment

• Principles of justification
Brief reminder of the principles: sources and scope
EU and Gender Equality

- **Art. 3 TEU**: *It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.*

- **Art. 8 TFEU**: *In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.*
EU and Gender Equality

- ECJ: prohibition of sex discrimination is a general principle of EU law

- Horizontal & Transversal

- With direct effect, both vertical and horizontal!
Specific Sources

• Art. 157 TFEU: equal pay
• D 79/7: social security
• D 2004/113: goods and services
• D 2006/54: employment and occupation
• D 2010/41: self-employed
Gender Equality in Employment

- Private an public sector
- Access to work, promotion & training
- Pay & Other working conditions & Termination
- Occupational social security of any type: scope, contributions & benefits
- Unionization & its benefits
- (Pregnancy, maternity leave, parental leave)

Irrespective of parties involved and of the legal sources
Brief reminder of the principles: notions
Acquired notions

• 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

• Indirect discrimination: the group
Warning

• No comprehensive theory or concept of discrimination

• Organic development, often case-law driven

• Still developing

• Tango between ECJ and national judges
Constitutive elements of prohibited discrimination
Constitutive Elements

• **Treatment**

• **Causal link** with the protected trait

• **Comparison**
Treatment

• Action or inaction

• Individual or collective

• Less favourable treatment:
  • Different + negative
  • Extent of the difference irrelevant
  • Both a punctual and a global approach
Treatment

• Action/inaction v. intention or simple words
• *Feryn* C-54/07 (2008): public declaration that is likely to impact the protected group

• ECJ:
  • Focus on the goal and effectiveness
  • Constitutes direct discrimination, even without any victim
  • Presumption of discrimination for the possible victim
Causation

- 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

• Primary causation (necessary or determining) v. secondary causation: one of the co-determining factors

• Importance of the proof system: presumption of causation/discrimination
Comparison

• 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)

Ë the factual disappearance of the comparator, but for proof expediency
Direct, indirect, and positive discrimination
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
Examples

• Age:
  • In human resources policies
  • In wage agreements
  • At individual or collective dismissal
  • Importance of justifications

• Racial/ethnic origin and religion:
  • Direct discrimination less common
Indirect Discrimination

• “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

• “Discriminatory” consequences that are **sufficiently disproportionate** (presumption)

• **Comparable situation**
Indirect Discrimination

• 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

- **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

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

- Seniority
- Physical requirement
- Part-time / Full Time
- Absenteeism
Example: degrees, recruitment, and race

- Statistical approach:
  - Determine the pool of candidates and its composition
  - Determine the pool of recruited candidates and its composition
  - In the particular company, for the particular job
  - Statistically reliable: numbers & duration
Example: degrees, recruitment, and race

• Potential discrimination:
  • Ethno-stratification in the school system
Direct/Indirect can be grey

- 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
“Positive” Discrimination

• Positive action vs. positive discrimination

• Directives authorize:
  
  • With a view to 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 the protected trait
“Positive” Discrimination

- Formal equality = norm / positive discrimination = the exception
- **Objective nature**: must clearly and objectively address group disadvantages
- **Legitimacy**: real and manifest group imbalance
- **Appropriate & necessary**: proportionality
- No automatic quota
Specific types of discrimination
Instruction to discriminate = Discrimination

• Instruction to discriminate **on grounds of a person’s sex** is equated with sex discrimination.

• Both the instructor and the executor can be involved
Harassment = Discrimination

- **Unwanted conduct** (non-verbal, verbal, physical) - purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

- **Harassment**: unwanted conduct related to the sex of a person

- **Sexual harassment**: unwanted conduct of a sexual nature
Harassment = Discrimination

• Any less favourable treatment based on:
  • A person’s rejection of harassment
  • A person’s submission to harassment
Justifications
Context

• 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

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

- Indirect discrimination can be justified (open system)
Direct Discrimination

- 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**
Direct sex discrimination: GDOR

• **Optional for MS**: genuine and determining occupational requirement

• Objective must be legitimate (i.e. non-discriminatory)

• Requirement must be proportionate – not beyond what is necessary

• Remains exceptional and to be determined on a case-by-case basis
Indirect Discrimination

• 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

- **Legitimate aim**: a real need for the undertaking or an acceptable policy aim - in particular non-discriminatory
- **Measure is effective** vis-à-vis the aim
- **Measure is appropriate and necessary**: no less discriminatory alternatives to achieve the aim
- Case-by-case – **no generalisations and stereotypes**
- **Cost alone cannot justify** (case-law in gender issues)
Examples

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

• Tool box with quite mature concepts

• The implication and application of the concepts leaves plenty of room for interpretation at MS level

• 2000 Directives: a work in progress

• Gender has moved beyond non-discrimination: mainstreaming and positive action
Contact Info

Prof. Dr. Marc De Vos
Ghent University

marc.devos@ugent.be